TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 243.

GUSTAV FALK AND ARNOLD FALK, PLAINTIFFS IN ERROR,

vs.

GEORGE MOEBS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JULY 11, 1885.

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1 The United States of America to George Moebs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Gustav Falk and Arnold Falk are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, judge of the district court and acting judge of the circuit court of the United States for the eastern district of Michigan, this 26th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

HENRY B. BROWN,
District Judge.

1½ [Endorsed:] U. S. circuit court E. dist. of Mich. Gustav Falk *et al. v.* George Moebs. Citation. Filed April 14, 1885. Walter S. Harsha, clerk. Griffin & Warner, att'ys for pl'ffs.

THE UNITED STATES OF AMERICA,
State & Eastern District of Michigan, Wayne County, } *ss:*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK & ARNOLD FALK *v.* GEORGE MOEBS.

On this sixth day of April, in the year of our Lord one thousand eight hundred and eighty-five, personally appeared Willard E. Warner before me, the subscriber, and makes oath that he delivered a true copy of the within citation to George Moebs by giving it to him personally, and at the same time showing this original to him with——

Sworn to and subscribed the sixth day of April, A. D. 1885.

ORMOND F. HUNT,
Notary Public, Wayne County, Mich.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Gustav Falk & Arnold Falk, as plaintiffs, and George Moebs, as defendant, a manifest error hath happened, to the great damage of the said Gustav Falk and Arnold Falk, as by their

complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 26th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States, Eastern District of Michigan.

Allowed by—
H. B. BROWN.

[Endorsed:] 6945. Supreme Court of the United States. Gustav Falk & Arnold Falk, pl'ff- in error, *v.* George Moebs, def't in error. Filed Feb'y 27, 1880. Walter S. Harsha, clerk. —— ——, att'ys for pl'ffs in error.

3 *Bond on Writ of Error.*

Know all men by these presents that we, Gustav Falk and Arnold Falk, as principals, and Louis Kuttnauer, of Detroit, Mich., as surety, are held and firmly bound unto George Moebs in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said George Moebs or to his certain attorney, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, heirs, executors, and administrators and each and every of them firmly by these presents. Sealed with our seals. Dated the 31 day of March, one thousand eight hundred and eighty-five.

Whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending — said court between Gustav Falk and Arnold Falk, as plaintiffs, and George Moebs, as defendant, judgment was rendered against the said plaintiffs, and the above-named Gustav Falk and Arnold Falk, conceiving themselves aggrieved thereby, have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of Michigan: Now, therefore, the condition of this obligation is such that if the above-named Gustav Falk and Arnold Falk shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their

plea, then this obligation to be void; otherwise to remain in full force and virtue.

GUSTAV FALK AND [SEAL.]
ARNOLD FALK. [SEAL.]
By GRIFFIN & WARNER,
Their Att'ys Duly Authorized.
LOUIS KUTTNAUER. [SEAL.]

Approved—
H. B. BROWN.

UNITED STATES OF AMERICA, }
State & Eastern District of Michigan, Wayne County, } *ss:*

Louis Kuttnauer, being duly sworn, says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

LOUIS KUTTNAUER.

Subscribed and sworn to before me this 31st day of March, 1885.
ORMOND F. HUNT,
Notary Public, Wayne Co., Mich.

Endorsed: 6945. U. S. circuit court, E. D. of Mich. Bond. Gustav Falk *et al. vs.* George Moebs. Filed April 14, 1885. Walter S. Harsha, clerk.

4 *Original Declaration.*

UNITED STATES OF AMERICA, }
Eastern District of Michigan, } *ss:*

The Circuit Court of the United States for the Eastern Dist. of Mich.

Gustav Falk and Arnold Falk, who are citizens of the State of New York, by Griffin & Warner, their attorneys, filing this declaration as commencement of suit, complain of George Moebs, who is a citizen of the State of Michigan and a resident of the eastern district thereof, of a plea of trespass on the case upon promises—

For that whereas, heretofore, to wit, on or about the 6th day of July, A. D. 1880, the said defendant was the secretary and treasurer of a certain body corporate doing business at the city of Detroit, State of Michigan, known as the Peninsular Cigar Company, and as such was engaged in the business of manufacturing, buying, and selling tobacco and cigars in said city of Detroit; that the said plaintiffs, on or about said date, were doing business as tobacco merchants in the city of New York; that on or about said date the said defendant, as secretary and treasurer of said Peninsula Cigar Company, applied to the said plaintiffs for the purchase of certain material, goods, wares, and merchandise in the line of plaintiffs' said business, and then and there ordered of said plaintiffs certain materials, goods,

wares, and merchandise, and offering in payment thereof the notes of the said Peninsula Cigar Company, and that it was thereupon and thereafter agreed by and between said plaintiffs and said defendant that the said plaintiffs would thereafter sell and deliver the materials and goods so applied for and ordered as aforesaid and any other goods which the said defendant, on behalf of said company, might thereafter apply for and order, and that in payment thereof that the said defendant should make, execute, and deliver to the said plaintiffs the notes of the said Peninsula Cigar Company, payable to the order of the said defendant and by him personally endorsed to the said plaintiffs; that the said defendant thereupon and thereafter ordered from the said plaintiffs certain materials and goods of the value of seven thousand four hundred and forty-nine $\frac{64}{100}$ dollars, and that in accordance with said agreement hereinbefore mentioned and on payment for said goods and materials aforesaid the said defendant, upon the several dates indicated and specified in the several promissory notes hereinafter mentioned and with the intent and design of binding, charging, and obligating himself as an endorser upon said notes, with the liability of an endorser as defined by the Law Merchant, made, executed, and delivered to the said plaintiffs nine certain promissory notes in the words and figures following, to wit:

$1,061.24. DETROIT, MICH., *Aug. 4th*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred and sixty-one & $\frac{24}{100}$ dollars at Merchants' and Manufacturers' National B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed on back: "Geo. Moebs, sec. & treas."

$1,075.94. DETROIT, MICH., *Aug.* 14, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred seventy-five & $\frac{94}{100}$ dollars at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed on back: "Geo. Moebs, sec. & tre's."

$535.50. DETROIT, MICH., *Sep.* 17, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred thirty-five & $\frac{50}{100}$ dollars at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed on back: "Geo. Moebs, sec. & tre's.

$476.63. DETROIT, MICH., *Sep.* 24, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., four hundred seventy-six $\frac{63}{100}$ dollars at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR Co.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed on back: "Geo. Moebs, sec. & tre's."

6 $965.72 DETROIT, MICH., *Oct.* 1*st*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & t[illegible]s., nine hundred sixty-five & $\frac{72}{100}$ dollars at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed on back: "Geo. Moebs, sec. & treas."

$1,456.74. DETROIT, MICH., *Oct.* 12, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., fourteen hundred fifty-six & $\frac{74}{100}$ dollars at Merchants' & Manufacturers' Nat. B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

$561.98. DETROIT, MICH., *Oct.* 22, *Cond.* 1883.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & tre's., five hundred sixty-one $\frac{98}{100}$ dollars at Merch. & Man'f. Nat'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: Pay to G. Falk & Bro. or order. "Geo. Moebs, sec. & tre's."

$753.87. DETROIT, MICH, *Oct.* 23*d*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., seven hundred fifty-three & $\frac{87}{100}$ dollars at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed on back: "Pay G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

$561.98. DETROIT, MICH., *Oct. 29th*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred sixty-one and $\frac{98}{100}$ — at Merch. and Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: "Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

7 Wherein and whereby the said defendant did bind and obligate himself personally as an endorser as aforesaid upon said notes; that the said notes, at the maturity thereof, were duly presented for payment and were dishonored, whereof the said defendant had due notice, but did not pay the same.

That the said defendant, afterwards and on the day and year aforesaid, at the place aforesaid, became liable to pay the plaintiffs the said several sums of money, and, being so liable, in consideration of the premises, then and there promised the said plaintiffs to pay them the said several sums of money on request, yet the said defendant has disregarded his said promises and has not paid any of said sums of money or any part thereof, although often requested so to do, to the plaintiffs' damage of the sum of ten thousand dollars.

For that whereas also the said defendant, on the 1st day of November, A. D. 1883, at the city of Detroit, in said district, was indebted to the plaintiffs in the sum of ten thousand dollars for money then and there lent by the plaintiffs to the defendant at his request.

And in a like sum for money then and there paid by the plaintiffs for the use of the defendant at his request.

And in a like sum for money then and there received by the defendant for the use of the plaintiffs.

And in a like sum for money then and there found to be due from the defendant to the plaintiffs on an account stated between them.

And thereupon the said defendant, afterwards and on the day and year and at the place aforesaid, in consideration of the premises, respectively, then and there promised the said plaintiffs to pay the said several last-mentioned moneys, respectively, on request, yet he has disregarded his promises and has not paid any of the said moneys or any part thereof, although often requested so to do, to the plaintiffs' damage of ten thousand dollars, and therefore they bring suit, &c.

GRIFFIN & WARNER,
Plaintiffs' Attorneys.

To the above-named defendant:

You will please take notice that on the trial of the above cause the plaintiffs, under the money counts, will give in evidence nine certain promissory notes, copies of which are given below, and

which constitute the sole bill of particulars of the plaintiffs' demand in the above-entitled cause under the said money counts of this declaration.

GRIFFIN & WARNER,
Plaintiffs' Attorneys.

8 *Copies.*

$1,061.24 DETROIT, MICH., *Aug. 4th*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred sixty-one & $\frac{24}{100}$ dollars, at Merchants' & Manufacturers' National B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

$1,075.94. DETROIT, MICH., *Aug.* 14, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred seventy-five & $\frac{94}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

$935.50. DETROIT, MICH., *Sept.* 17, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred thirty-five & $\frac{50}{100}$ dollars, at Merchants' and Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

$476.63. DETROIT, MICH., *Sep.* 24, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., four hundred seventy-six & $\frac{63}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Trea.*

Endorsed: "Geo. Moebs, sec. & tre's."

$965.72. DETROIT, MICH., *Oct.* 1*st*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., nine hundred sixty-five & $\frac{72}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre.*

Endorsed: "Geo. Moebs, sec. & tre's."

9 $1.456.74. DETROIT, MICH., *Oct.* 12, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., fourteen hundred and fifty-six & $\frac{74}{100}$ dollars, at Merchants' & Manufacturers' Nat. B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

$561.98. DETROIT, MICH., *Oct. 22nd*, 1883.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & tre's., five hundred sixty-one & $\frac{98}{100}$ dollars, at Merch. & Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: "Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & treas."

$753.87. DETROIT, MICH., *Oct. 23d*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Mobes, sec. & treas., seven hundred fifty-three & $\frac{87}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre.*

Endorsed: "Pay G. Falk & Bro. or order. Geo. Moebs sec. & tre."

$561.98. DETROIT, MICH., *Oct. 29th*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred sixty-one $\frac{98}{100}$ dollars, at Merch. and Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre.*

Endorsed: "Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

10 We hereby become security for costs in this cause.

GRIFFIN & WARNER.

Endorsed: No. 6945. United States c't court, eastern dis't of Michigan. Gustav Falk *et al. vs.* George Moebs. Declaration. Filed Nov. 22, 1883. Walter S. Harsha, clerk.

11 *Rule to Plead.*

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

Nov. 22, 1883.

On filing declaration in this cause as commencement of suit and on motion of Griffin & Warner, attorneys for plaintiffs, it is ordered that the defendant in this cause appear and plead, answer, or demur to said declaration within twenty days after service upon him of a copy thereof and notice of this rule, or judgment, &c.

GRIFFIN & WARNER,
Att'ys for Pl'ffs.

12 *Proof of Service of Declaration.*

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Michigan, }

The Circuit Court of the United States for the Eastern Dist. of Mich.

Gustav Falk and Arnold Falk, who are citizens of the State of New York, by Griffin & Warner, their attorneys, filing this declaration as commencement of suit, complain of George Moebs, who is a citizen of the State of Michigan and a resident of the eastern district thereof, of a plea of trespass on the case upon promises.

For that whereas heretofore, to wit, on or about the 6th day of July, A. D. 1880, the said defendant was the secretary and treasurer of a certain body corporate doing business at the city of Detroit, State of Michigan, known as the Peninsular Cigar Company, and as such was engaged in the business of manufacturing, buying, and selling tobacco and cigars in said city of Detroit.

That the said plaintiffs, on or about said date, were doing business as tobacco merchants in the city of New York; that on or about said date the said defendant, as secretary and treasurer of said Peninsular Cigar Company, applied to the said plaintiffs for the purchase of certain materials, goods, wares, and merchandise in the line of plaintiffs' said business, and then and there ordered of said plaintiffs certain materials, goods, wares, and merchandise, and offering in payment thereof the notes of the said Peninsular Cigar Company, and that it was thereupon and thereafter agreed by and between said plaintiffs and said defendant that the said plaintiffs would thereafter sell and deliver the materials and goods so applied for and ordered as aforesaid and any other goods which the said defendant, on behalf of said company, might thereafter apply for and order, and that in payment thereof *that* the said defendant should make, execute, and deliver to the said plaintiffs the notes of the said Peninsular Cigar Company, payable to the order of the said defendant, and by him personally endorsed to the said plaintiffs; that the said defendant thereupon and thereafter ordered from the said plaintiffs certain materials and goods of the value of seven thousand four hundred and forty-nine $\frac{64}{100}$ dollars, and that in accordance with said

agreement hereinbefore mentioned and on payment for said goods and materials aforesaid the said defendant, upon the several dates indicated and specified in the several promissory notes hereinafter mentioned and with the intent and design of binding, charging, and obligating himself as an indorser upon said notes with the liability of an endorser as defined by the Law Merchant, made, exe-
13 cuted, and delivered to the said plaintiffs nine certain promissory notes in the words and figures following, to wit:

$1,061.24. DETROIT MICH., *Aug. 4th*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred and sixty-one & $\frac{24}{100}$ dollars, at Merchants' and Manufacturers' National B'k, value received.

PENINSULAR CICAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed on back: "Geo. Moebs, sec. & treas."

$1,075.94. DETROIT, MICH., *Aug.* 14, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred seventy-five & $\frac{94}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed on back: "Geo. Moebs, sec. & treas."

$535.50. DETROIT, MICH., *Sep.* 17, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred thirty-five & $\frac{50}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CICAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed on back: "Geo. Moebs, sec. & tre's."

$476.63. DETROIT, MICH., *Sep.* 24, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., four hundred seventy-six $\frac{63}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed on back: "Geo. Moebs, sec. & tre's."

14 $965.72. DETROIT, MICH., *Oct. 1st*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., nine hundred sixty-five & $\frac{72}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed on back: "Geo. Moebs, sec. & tre's."

$1,456.74. DETROIT, MICH., *Oct.* 12, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., fourteen hundred fifty-six & $\frac{74}{100}$ dollars, at Merchants' & Manufacturers' Nat. B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

$561.98. DETROIT, MICH., *Oct.* 22*nd*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & tre's., five hundred sixty-one $\frac{98}{100}$ dollars, at Merch. & Man'f. Nat'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: Pay to G. Falk & Bro. or order. "Geo. Moebs, sec. & tre's."

$753.87. DETROIT, MICH., *Oct.* 23*d*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., seven hundred fifty-three & $\frac{87}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed on back: "Pay G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

$561.98. DETROIT, MICH., *Oct.* 29*th*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred sixty-one and $\frac{98}{100}$ —, at Merch. and Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: "Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

15 Wherein and whereby the said defendant did bind and obligate himself personally as an endorser as aforesaid upon said notes; that the said notes, at the maturity thereof, were duly presented for payment and were dishonored, whereof the said defendant had due notice, but did not pay the same.

That the said defendant afterwards and on the day and year aforesaid, at the place aforesaid, became liable to pay the plaintiffs the said several sums of money, and, being so liable, in consideration of the premises, then and there promised the said plaintiffs to pay them the said several sums of money on request, yet the said defendant has disregarded his said promises and has not paid any of the said

sums of money or any part thereof, although often requested so to do, to the plaintiffs' damage of the sum of ten thousand dollars.

For that whereas also the said defendant, on the 1st day of November, A. D. 1883, at the city of Detroit, in said district, was indebted to the plaintiffs in the sum of ten thousand dollars for money then and there lent by the plaintiffs to the defendant at his request.

And in like sum for money then and there paid by the plaintiffs for the use of the defendant at his request.

And in a like sum for money then and there received by the defendant for the use of the plaintiffs.

And in a like sum for money then and there found to be due from the defendant to the plaintiffs on an account stated between them.

And thereupon the said defendant, afterwards and on the day and year and at the place aforesaid, in consideration of the premises, respectively, then and there promised the said plaintiffs to pay them the said several last-mentioned moneys, respectively, on request, yet he has disregarded his promises and has not paid any of the said moneys or any part thereof, although often requested so to do, to the plaintiffs' damage of ten thousand dollars, and therefore they bring suit, &c.

GRIFFIN & WARNER,
Plaintiffs' Attorneys.

To the above-named defendant:

You will please take notice that on the trial of the above cause the plaintiffs, under the money counts, will give in evidence nine certain promissory notes, copies of which are given below, and which constitutes the sole bill of particulars of the plaintiffs' demand in the above-entitled cause under the said money counts of this declaration.

GRIFFIN & WARNER,
Plaintiffs' Attorneys.

16 *Copies.*

$1,061.24. DETROIT, MICH., *Aug. 4th*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred sixty-one & $\frac{24}{100}$ dollars, at Merchants' & Manufacturers' National B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

$1,075.94. DETROIT, MICH., *Aug.* 14, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred seventy-five & $\frac{94}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: "Geo. Moebs, sec. & treas."

\$535.50. DETROIT, MICH., *Sept.* 17, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred thirty-five & $\frac{50}{100}$ dollars, at Merchants' and Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: "Geo. Moebs, sec. & treas."

\$476.63. DETROIT, MICH., *Sep.* 24, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., four hundred seventy-six & $\frac{63}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

\$965.72. DETROIT, MICH., *Oct.* 1*st*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., nine hundred sixty-five & $\frac{72}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre.*

Endorsed: "Geo. Moebs, sec. & tre's."

17 \$1,456.74. DETROIT MICH., *Oct.* 12, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. and treas., fourteen hundred fifty-six & $\frac{74}{100}$ dollars, at Merchants' & Manufacturers' Nat. B'k, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

\$561.98. DETROIT, MICH., *Oct.* 22*d*, 1883.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & tre's., five hundred sixty-one & $\frac{98}{100}$ dollars, at Merch. and Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre's.*

Endorsed: "Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & treas."

$753.87. DETROIT, MICH., *Oct.* 23*d*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., seven hundred fifty-three & $\frac{87}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Tre.*

Endorsed: "Pay G. Falk & Bro. or order. Geo. Moebs, sec. & tre."

$561.98. DETROIT, MICH., *Oct.* 29*th*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred sixty-one & $\frac{98}{100}$ dollars, at Merch. and Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.
GEO. MOEBS, *Sec. & Tre.*

Endorsed: "Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

18 To the within-named defendant:

Take notice that on filing a declaration in this cause, of which the within is a true copy, as commencement of suit a rule was entered in the book of common rules kept by the clerk of said court in his office, in Detroit, Michigan, requiring you to appear and plead to said declaration within twenty (20) days after service on you of a copy thereof and notice of said rule, or judgment, etc.

Yours, etc., GRIFFIN & WARNER,
Att'ys for Plaintiffs.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 28th day of November, A. D. 1883, I served the narr. of which the within is a copy on George Moebs, within named, by delivering to him personally a copy of said narr. and of the foregoing notice relating thereto, together with a true copy of the notice to appear and plead endorsed thereon as is hereon endorsed.

S. S. MATTHEWS, *Marshal,*
By A. S. MATTHEWS, *Deputy.*

Fees, $2.30.

Endorsed: No. 6945. United States circuit court, eastern dist. of Michigan. Gustav Falk & Arnold Falk *vs.* George Moebs. Copy narr. Filed Nov. 28, 1883. Walter S. Harsha, clerk.

19 *Demurrer to Special Count and Plea, General Issue, &c.*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK & ARNOLD FALK *vs.* GEORGE MOEBS.

The said defendant says that the said special count in said declaration is not sufficient in law.

Dec. 17th, 1883.

DICKINSON, THURBER & HOSMER,
Def'ts' Att'ys.

GUSTAV FALK & ARNOLD FALK *vs.* GEORGE MOEBS.

And now comes said defendant, by his attorneys, Dickinson, Thurber & Hosmer, and demands a trial of the matters set forth under the common counts of said plaintiffs' declaration.

Dec. 17th, 1883.

DICKINSON, THURBER & HOSMER,
Att'ys for Def't.

Endorsed: 6945. The circuit court of the United States for the east. dist. of Michigan. Gustav Falk *et al. vs.* George Moebs. Demurrer to special count and plea, gen. issue to common counts. Filed in clerk's office Dec. 17, 1883. Walter S. Harsha, clerk.

20 *Motion to Set Aside Demurrer.*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK & ARNOLD FALK *vs.* GEORGE MOEBS.

Plaintiffs move to set aside the demurrer to the special count in the declaration filed in this cause as irregular for the following reasons, to wit:

1. Said demurrer does not assign any causes of demurrer.
2. Said demurrer is frivolous, inasmuch as it raises no question of law.

Said motion is based upon the paper filed as a demurrer to the special count in said declaration and upon the files and records in said cause.

To said defendants:

You will please take notice that this motion will be brought on for hearing on Monday, December 24th, 1883, at the opening of court on that day, or as soon thereafter as counsel can be heard.

December 20th, 1883.

GRIFFIN & WARNER,
Att'ys for Pl'ffs.

Endorsed: 6945. The circuit court of the United States for the eastern district of Michigan. Gustav Falk & Arnold Falk *vs.* George Moebs. Motion to set aside demurrer and notice. Filed in clerk's office Dec. 29th, 1883. Walter S. Harsha, clerk.

21 *Motion to Set Aside Demurrer Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the twenty-fourth day of December, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

In this cause a motion by plaintiffs to set aside the demurrer filed by the defendant to the special count in plaintiffs' declaration is argued by Mr. L. T. Griffin, for plaintiffs, and Mr. Geo. S. Hosmer, for defendant, and submitted.

22 *Order Denying Motion to Strike Demurrer from Files.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the thirty-first day of December, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK *et al. vs.* GEORGE MOEBS.

In this cause a motion by plaintiffs to strike from the files the demurrer filed by defendant to the special count of plaintiffs' declaration heretofore argued and submitted, after due deliberation, is by the court now here denied.

23 *Joinder in Demurrer.*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK & ARNOLD FALK *vs.* GEORGE MOEBS.

The said plaintiffs say that the said special count in said declaration is sufficient in law.

Jan. 2, 1884.

GRIFFIN & WARNER,
Att'ys for Pl'ffs.

Endorsed: 6945. The circuit court of the United States for the eastern district of Michigan. Gustav Falk & Arnold Falk *vs.* George Moebs. Joinder in demurrer. Filed in clerk's office Jan. 2, 1884. Walter S. Harsha, clerk.

24 *Notice of Setting Down Demurrer for Argument.*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK — ARNOLD FALK *vs.* GEORGE MOEBS.

GENTLEMEN: You will please take notice that the argument of the demurrer to the special count of the declaration in this cause will be brought on for hearing on Monday, Jan. 14th, 1884, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Yours, etc., GRIFFIN & WARNER,
Attorneys for Plaintiffs.

To Dickinson, Thurber and Hosmer, attorneys for defendant.

Endorsed: No. 6945. U. S. circuit court, e'st. dis. of Mich. Gustav Falk & Arnold Falk *vs.* George Moebs. Notice of hearing of demurrer. Filed in clerk's office Jan. 10, 1884. Walter S. Harsha, clerk.

25 *Demurrer Argued and Submitted.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Monday, the eighteenth day of February, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK *et al. vs.* GEORGE MOEBS.

In this cause a demurrer by defendant to plaintiffs' declaration having been brought on for argument, after hearing Mr. Don M. Dickinson, of counsel for defendant, and Mr. C. E. Warner, of counsel for plaintiffs, in opposition, said matter is submitted.

26 *Order for Reargument of Demurrer Before Full Bench.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Monday, the third day of March, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

In this cause it is ordered that the demurrer to plaintiffs' declaration be reargued before a full bench.

27 *Argument of Demurrer Before Full Bench.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Friday, the twenty-first day of March, in the year one thousand eight hundred and eighty-four.

Present: The Honorable John Baxter, circuit judge, and the Honorable Henry B. Brown, district judge.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

Before full bench.

In this cause a demurrer by defendant to plaintiffs' declaration having come on for argument before a full bench, the court hears Mr. Don M. Dickinson, of counsel for defendant, in favor of said demurrer, and Mr. C. E. Warner, of counsel for plaintiffs, in opposition thereto, and said matter is submitted.

28 *Order Sustaining Demurrer.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Monday, the twelfth day of May, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

This cause having been heretofore heard and submitted before a full bench on the demurrer of the defendant to the special count of the plaintiffs' declaration, now, after due consideration thereof, it appearing to the court that the special count of said declaration of the said plaintiffs and the matters therein contained are not sufficient in law, the demurrer of the defendant to the said count is hereby sustained.

The district judge dissents from above decision.

29 *Opinion of the Circuit Judge.*

UNITED STATES COURTS, JUDGES' ROOMS,
CINCINNATI, O., *May 6th*, 1884.

MY DEAR JUDGE: After careful consideration of the case of Falk *et al. vs.* Moebs I think the contract declared on is a bill drawn by, payable to, and endorsed by the corporation. Such is its legal purport. If so, the previous correspondence between the parties cannot be received to modify or vary its terms and legal meaning, and thereby convert it into a personal obligation of the corporation's secretary and treasurer. See Martin *vs.* Cole, 104, U. S. Reports, 38 & 39.

The demurrer, in my opinion, ought to be sustained. Pl'ffs' remedy, if they have one, is a bill to reform the contract.

Very truly yours, JNO. BAXTER.

Hon. Henry B. Brown, Detroit, Michigan.

Endorsed: 6945. Gustav Falk *et al. vs.* George Moebs. Opinion of circuit judge. Filed May 12, 1884. Walter S. Harsha, clerk.

30 *Opinion of District Judge in Letter to Judge Baxter.*

Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK *et al. vs.* GEORGE MOEBS.

This is a demurrer to the special count of the plaintiffs' declaration, which alleges in substance that defendant was secretary and treasurer of the Peninsular Cigar Co., and as such was engaged in the business of manufacturing, buying, and selling tobacco and cigars in the city of Detroit; that plaintiffs were tobacco merchants in New York, and that defendant, as secretary and treasurer of said company, applied to them for the purchase of certain goods in the line of their business, offering in payment notes of the cigar company; that it was thereupon and thereafter agreed between the plaintiffs and defendant that plaintiffs would sell the goods and any other goods which the defendant on behalf of the company might thereafter order, and that in payment defendant should make and deliver to plaintiffs the notes of said company, payable to the order of said defendant, and by him personally endorsed to the plaintiffs; the defendant thereupon ordered goods to the value of $7,449.64; that in accordance with said agreement mentioned and in payment for said goods upon the several dates indicated in the notes mentioned in the declaration, and with the intent and design of binding and obligating himself as endorser on said notes, with the liability of endorser as defined by Law Merchant, executed and delivered to plaintiffs nine promissory notes, copies of which are set forth, wherein said defendant bound and obligated himself personally as an endorser thereon, which said notes, at maturity, were presented for payment and dishonored, whereof the defendant had due notice; these notes were substantially all in the same form, the following being a copy of one of them:

$1,061.24. DETROIT, MICH., *Aug. 4th*, 1880.

Four months after date we promise to pay to the order of George Moebs, sec. and treas., ten hundred and sixty-one & $\frac{24}{100}$ dollars at the Merchants' and Manufacturers' Bank, value received.

(S'g'd) PENINSULAR CIGAR CO.,
GEORGE MOEBS, *Sec. & Treas.*

Endorsed: Geo. Moebs, sec. and treas.

Defendant demurred upon the ground that the endorsement, taken in connection with the face of the note, purported to be the endorsement of the company by its treasurer and secretary, and that no evidence, even by correspondence, could be shown to affect the endorsement so made.

31 There are then three questions to be considered:

1. Whether the endorsement is that of Moebs personally or of the company by him, as its secretary and treasurer.

2. Whether as between the original parties to the instrument the correspondence between them may not be given in evidence to show the real intent of the party.

3. Whether parol evidence is competent to show the circumstances under which the note was made, and to explain what was intended by the endorsement.

With regard to the first question, as to the meaning of the endorsement upon its face, I think the case is practically controlled by that of Hitchcock *vs.* Buchanan, 105 U. S. 416, wherein a bill of exchange headed "Office of Belleville Nail Mill Co.," and concluding "charge same to account of Belleville Nail Co., A. B., president, C. D., secretary," was held the bill of the company and not of the individual signers. At the same time the authorities are by no means harmonious upon this point, and were it not for this case I should feel very considerable doubt whether defendant was not personally bound by the indorsement, the words "secretary and treasurer" being rejected as surplusage. Undoubtedly where bank paper is made payable to A. B., cashier, or "cash.," his indorsement is regarded as the indorsement of the bank, but with respect to other papers the authorities are pretty evenly divided, and will be found collated in 1 Daniel's Negotiable Instruments, sec. 400 to 419, especially sec. 415.

With regard to the second and third questions, which may be considered together, although it does not expressly appear in the special count that the evidence of fraud is in writing, we are bound to presume that the evidence is competent for the purpose for which it was offered. In other words, if it were necessary that such evidence should be in writing it is not necessary to set forth this fact in the declaration. Thus, in Brown on the Statute of Frauds, sec. 505, it is said: "It is not necessary to state in the pleadings that the contract has been reduced to writing, for the statute of frauds has made no alteration in the rules of pleading, and where the plaintiff declares, as he might at common law, upon the agreement generally, without stating whether it is in writing or not, it will be presumed to be in writing, and if the making of the agreement is denied he is simply required to produce the memorandum in evidence at the trial or hearing." This is understood to be well-settled law.

As between the immediate parties to negotiable paper, I understand that antecedent or cotemporaneous writings which culminated in the giving of the bill may control the effect of it, subject to the same conditions which would be requisite in a case of an ordinary contract. A number of authorities are cited in the abstract in Mr. Warner's brief upon this subject, and I know of none to the contrary; defendant certainly cited none in his brief.

32 But it seems to me we may go further in this case and admit parol evidence to explain the endorsement. No stronger case upon this point can be found than that of the Mechanics' Bank *vs.* The Bank of Columbia, 5 Wheat., 326, in which parol evidence was admitted to show that a check drawn apparently by an individual was really an official act. The check was as follows:

MECHANICS' BANK OF COLUMBIA, *June 25th*, 1817.

Cashier of the Bank of Columbia, pay to the order of P. H. Miner, Esq., ten thousand dollars.

(S'g'd) WILLIAM PATEN, JR.

This upon its face was clearly the individual check of Paten, but parol evidence was admitted by the Supreme Court to show that in reality he was the cashier of the Mechanics' Bank, and drew the check in that capacity. The case is the converse of the one under consideration. The evidence from the face of the check was no stronger that Paton signed individually than in this case that the defendant signed as secretary and treasurer, and yet parol evidence was admitted to explain the ambiguity. See also the case of Davis *vs.* Brown, 94 U. S., 423, and the cases cited by plaintiff in his brief. The two cases cited by defendant from Massachusetts seem to me to have no relevancy to this question.

In the Tucker M'f'g Co. *vs.* Fairbanks, 94 U. S., 101, too much is proven. A bill of exchange drawn on the P. Ins. Co. by their agents, F. & Co., and ending thus: "Charge the same to the account of F. & Co., ag'ts of P. Ins. Co.," binds F. & Co. personally as drawers, although delivered by the insurance company to the payee in payment of a loss on one of their policies. Upon this authority they ought to be held personally without parol evidence.

The question of admitting extraneous evidence is also discussed in 1 Daniell's Negotiable Instruments, sec. 418, 419. There is also a case from N. J., as well as several others cited in plaintiffs' brief, which seem to me to establish this proposition, that evidence of this kind is admissible. The making of the paper by a corporation, payable to the order of its secretary and treasurer, is not a usual method of doing business; the corporation is bound by its signature to the instrument. The indorsement gives it no additional efficacy as against the corporation. If it were given for goods purchased the most natural way would be to make the notes payable to the order of the vendor. This is probably the case in nineteen cases out of twenty, and I think a very natural inference would be that it was intended by the indorsement to charge the person indorsing individually, and that the addition of the words "secretary and treasurer" were an oversight or possibly done with intent to deceive and escape liability.

My own opinion is that the demurrer should be overruled.

Endorsed: 6945. Gustav Falk *et al. vs.* George Moebs. Opinion of district judge. Filed May 12, 1884. Walter S. Harsha, clerk.

33 *Motion for Rehearing of Demurrer.*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAVE FALK *et al. vs.* GEORGE MOEBS.

Now comes the said plaintiffs and move for a rehearing and a reargument upon the demurrer filed in this cause for reasons as follows, to wit:

1. A proper consideration of the decisions of the Supreme Court of the United States shows that said demurrer is not well taken.

2. A careful consideration of the case of Davis *v.* Brown, 94 U. S., 427, will show that the decision there rendered is decisive of the question raised by the demurrer and adversely to the defendant.

3. The attention of the court was not called to the case of Martin *v.* Cole, 104 U. S., 30, where the Supreme Court of the United States substantially conceded the rule as contended for by the plaintiffs in this cause with reference to the admissibility of contemporaneous written instruments.

4. The testimony proposed to be introduced is now in deposition form, so that it can be fairly considered by the court.

5. The testimony shows that the agreement mentioned in the said count is in writing and consists of letters in which the defendant obligated himself personally and upon the basis of which notes were accepted with his endorsement.

For reasons stated above plaintiffs' counsel will also move the court for a trial at the present term as well as in view of the additional fact that there is no term of this court until November and that a writ of error taken by either party could not be made returnable until October, 1885, and could not be heard before the Supreme Court for a period of some two or three years thereafter.

GRIFFIN & WARNER,
Att'ys for Pl'ffs.

Endorsed: No. 6945. The circuit court of the United States for the eastern dist. of Mich. Gustav Falk *et al. vs.* George Moebs. Motion. Filed in clerk's office June 7, 1884. Walter S. Harsha, clerk.

34 *Trial and Verdict.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the thirteenth day of November, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, Michael Thatcher, Norris O. Seeley, John Conway, William S. Bingham, James F. Brown, Daniel Follinsbee, Josiah Pratt, James A. Tiller, Stephen Adams, John T. Brooks, Stephen J. Martin, and George C. Wyllis, good and lawful men, who, being duly impaneled, tried, and sworn well and truly to try the issue between the parties, sit together, and, after hearing the proofs offered by the plaintiffs, under the instructions of the court, without leaving their seats, say upon their oath that the said defendant did not undertake and promise in manner and form as the said plaintiffs have in their declaration in this cause complained against him.

35 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the sixteenth day of March, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

The jury by whom the issue in this cause was tried having heretofore rendered a verdict therein in favor of the defendant, now, on motion of Dickinson, Thurber & Hosmer, attorneys for the defendant, it is by the court now here considered that the said plaintiffs take nothing by their suit, and that the said defendant do go thereof without day; and it is further considered that the said defendant do recover against the said plaintiffs his costs and charges by him about his defense in this behalf expended, to be taxed, and that he have execution therefor.

By consent of counsel for the respective parties this judgment is entered *nunc pro tunc* as of Nov. 15, 1884.

35½ *Bill of Exceptions.*

In the Circuit Court of the United States for the Eastern District of Michigan.

GUSTAV FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

This cause, on, to wit, the 13th day of November, A. D. 1884, came on for trial before the court and a jury, and the plaintiffs, to maintain the issue upon their part, offered in evidence nine certain promissory notes, true copies of which were set forth in the plaintiffs' declaration in this cause, together with certificates of protest attached thereto, showing that each of said notes, respectively, was properly protested for non-payment, and due notice thereof given to said defendant, true copies of which said notes are attached to the

deposition of Arnold Falk, hereto annexd, marked Exhibit "A," and which said notes are marked Exhibits "9," "10," "11," "12," "13," "14," "15," "16," and "17," respectively.

Defendant, by his counsel, objected to the introduction of said notes in evidence upon the ground that they had no tendency to show a claim against the defendant.

The court sustained the objection; to which ruling counsel for the plaintiffs then and there excepted.

Said plaintiffs, by their counsel, for the purpose of show-
36 ing a personal and individual liability of the defendant upon the notes so offered in evidence, then offered to show in connection therewith the facts and circumstances appearing by the deposition of Arnold Falk, one of the plaintiffs, theretofore duly and regularly taken in pursuance of a stipulation signed by the attorneys for the respective parties, that same might be used subject to objection for competency, relevancy, and materiality, and then on file in said court, and then offered to read said deposition in evidence, a true copy of said deposition being hereto annexed, marked Exhibit "A;" to which said defendant, by his counsel, objected.

COURT: As the demurrer to the special count of the plaintiffs' declaration in this cause was sustained by the circuit judge, I shall rule out and exclude such testimony.

To which said ruling and to the exclusion of such testimony said plaintiffs, by their counsel, then and there duly excepted.

The plaintiffs then rested their case.

The court thereupon instructed the jury as follows:

GENTLEMEN OF THE JURY: This case has been practically disposed of upon a demurrer to the special count in the declaration, and I instruct you as a matter of law that the plaintiffs have made out no case and your verdict should be for the defendant.

To which said instruction counsel for the plaintiffs then and there duly excepted.

The jury thereupon, in accordance with the instruction of the court, returned a verdict in favor of said defendant.

And because none of said exceptions appear of record this bill of exceptions is made, settled, and signed this 26th day of
37 February, A. D. 1885.

HENRY B. BROWN, [SEAL.]
District Judge.

O. K. D. M. DICKINSON.

38 "EXHIBIT A."

ARNOLD FALK, being duly sworn and examined, testified and deposed as follows:

My name is Arnold Falk; aged 41 years; residence, 129 East 64th street, New York city; occupation, merchant. I am one of the plaintiffs, and a member of the firm of G. Falk and Brother, dealers in tobacco, doing business at 171 Water street, New York city. The firm is composed of Gustav Falk and myself.

I know the defendant, George Moebs, and have known him about 13 years. For about four years prior to November, 1880, the defendant was the secretary and treasurer of the Peninsular Cigar Company, doing business in the city of Detroit, Michigan. That company were the successors of Geo. Moebs & Co.

My firm has been in business for the past 25 years. The firm of Geo. Moebs & Co. was in existence for about four years, and my firm dealt with that firm during its existence.

During the time my firm did business with the Peninsular Cigar Company, and down to May, 1880, we had sold them goods and taken their notes, payable always to the order of G. Falk & Bro. In the month of May, 1880, we concluded not to take any more notes of the Peninsular Cigar Company unless the same were endorsed by a responsible party. Accordingly, and on the 28th day of May, 1880, my firm wrote to the defendant a letter in German, of which a true and correct translation I produce.

Letter marked Plaintiffs' Ex. 1, May 29, '84, P. P. Pope, notary, &c.

In reply to that letter we received from the defendant a letter in German, which I produce.

Letter marked Pl'ffs' Ex. 2, May 29, '84, P. P. Pope, notary, &c.

I also produce a true and correct translation of the letter, Ex. 2.

Translation marked Pl'ffs' Ex. 3, May 29, '84, P. P. Pope, notary, &c.

39 On June 16, 1880, we wrote to the defendant a letter in German, a true and correct translation of which I produce.

Letter marked Pl'ffs' Ex. 4, May 29, '84, P. P. Pope, notary, &c.

In reply to that letter we received from the defendant a letter in German, which I produce.

Letter marked Pl'ffs' Ex. 5, May 29, '84, P. P. Pope, notary, &c.

I also produce a true and correct translation of said letter.

Translation marked Pl'ffs' Ex. 6, May 29, '84, P. P. Pope, notary.

Between the time of the receipt by us of the letter last mentioned the Peninsular Cigar Company, through the defendant, applied to Ferdinand Frankel, our salesman, who was at the time of the application in Detroit, to sell them a bill of goods, consisting of 33 bales of tobacco, amounting to $3,261.14. As soon as we learned from our salesman of the application we wrote to the defendant, on July 6th, 1880, a letter in English, a true copy of which I produce.

Letter marked Pl'ffs' Ex. 7, May 29, '84, P. P. Pope, notary, &c.

In reply to that letter we received from the defendant a letter which I now produce.

Letter marked Pl'ffs' Ex. 8, May 29, '84, P. P. Pope, notary, &c.

Upon receiving the letter, Ex. 8, and on the 12th or 13th of July, 1880, we commenced to ship to the Peninsular Cigar Company a part

of the bill of goods which the company had applied to us to sell them, as I have stated. After that we continued to ship the balance of that bill of goods until the whole of it was shipped. We continued after that to fill orders for tobacco from the Peninsular Cigar Company and ship the goods until we had shipped them on their orders tobacco amounting, at the agreed prices, to $7,449.60.

40 From time to time, as the goods were shipped, we received therefor the notes of the Peninsular Cigar Company, and received from them notes for the entire amount of the goods sold, to wit, $7,449.60. Those notes are nine in number, and I now produce them. All of the notes were protested for non-payment, and attached to each of them is a notice of protest.

Notes and notices of protest marked, respectively, " Pl'ffs' Exhibits 9 to 17, both inclusive, May 29, '84, P. P. Pope, notary, &c."

No part of the amount of said notes or the protest fees thereon has been paid to the plaintiffs, my firm. We are the owners and holders of all of said notes, and have been since they were made and delivered. They were given for goods sold and delivered by us to the Peninsular Cigar Company. The goods for which said notes were given were sold and delivered by us solely and only relying upon the endorsement of the said notes by the defendant. We would not have sold or delivered the goods to the Peninsular Cigar Company and taken their notes therefor unless the same were endorsed by the defendant. We knew the defendant and had confidence in his financial responsibility, but we had no confidence in the financial responsibility of the Peninsular Cigar Company. We sold and delivered to the Peninsular Cigar Company the goods I have before stated, relying upon the agreement of the defendant to make notes to his order and endorse them, contained in Exhibit 8, and we would not have sold said goods if the defendant had not so agreed. Between the date of Exhibit 7 and the time of the receipt by us of Exhibit 8 my firm had no correspondence with the defendant.

I am personally fully familiar with the details of the sales of the goods above-mentioned, the giving of said notes, and the cor-
41 respondence above set forth, and also the circumstances under which said goods were sold and said notes taken.

(S'g'd) ARNOLD FALK.

Subscribed and sworn te before me this 29th day of May, 1884.

(S'g'd) P. P. POPE,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

PL'FFS' EX. 1.

Office G. Falk & Bro., leaf tobacco, 171 Water street, New York.

NEW YORK, *May 28th*, 1880.

FRIEND MOEBS: You, no doubt, will be greatly surprised at receiving a letter from me. I will explain the cause of it. We tried to have the last two notes you sent us discounted in our bank, but could not.

Had we not invested largely in new tobacco we would have kept the notes till their maturity. We trust you understand our position, and in case you order any tobacco of the samples sent you, you will give us your notes with a good endorser, so that we can have them discounted either in our bank or in the market. We only desire this till the fall, and will be always ready to reciprocate in any way we can.

We would not ask this did we not consider you our friend, and thought it best to tell you the exact circumstances.

Trusting to receive an early reply, we remain, yours,

(S'g'd) G. FALK & BRO.

42 PL'FFS' EX. 3.

Office of G. Falk & Co., leaf tobacco, 171 Water street, New York.

DETROIT, MICH., *June 9th*, 1880.

Mess. G. Falk & Bro.

DEAR SIRS: Yours of 20th May received, and would have answered sooner had the samples not been lost on account of the express bag, which we did not receive until Saturday.

We have tried the samples sent and could use Vega 30, but cannot order under the terms which you propose.

We have, up to this time, never been asked to have an endorser on our notes, and would not do it, as we are pressed for orders from all sides without giving an endorser.

We find no fault with you; you are the owner of the goods and can dispose of them as you see fit. The small quantity of tobacco which we use we can buy without asking for endorsements.

With regards, we remain yours resp'tf'y,

(S'g'd) PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec'y & Treas.*

43 "PL'FFS' EX. 4."

Office of G. Falk & Bro., leaf tobacco, 171 Water street, New York.

NEW YORK, *June 16th*, 1880.

FRIEND MOEBS: Yours of the 9th inst. received, and would have answered sooner, but have just returned from Pennsylvania.

You seem to misunderstand us, the way you write about endorsers. If you would endorse the notes personally, instead of the

company, we think the bank would discount them. You seem also to mistrust us, but assure you we can do nothing with the notes as they now are.

The cashier of our bank asked us to write to you for a statement of the company, and if he finds it satisfactory he will discount the notes with our endorsement. You will please, therefore, kindly favor us with a statement for our private use only.

Trusting to hear from you soon, we remain yours,

(S'g'd) FALK & BRO.

44 PL'FFS' EX. 6.

Office of G. Falk & Bro., leaf tobacco, 171 Water street, New York.

DETROIT, MICH., *June 21st*, 1884.

G. Falk & Bro.

DEAR SIRS: Yours of 16th received, and in reply would say that it seems that you doubt our ability to meet our obligations.

We have dealt together since 1871 and you have never asked for a statement.

I can hardly believe your statement that you cannot use our notes if you endorse them, as I know your firm stands high. In such a case we would even be better situated, because we can use all business papers in our bank without outside endorsements. However the case may be, our company stands as good to-day as it did when we commenced, and nobody can say that we failed to meet any of our obligations.

I cannot give you a statement correct in all its details until July, when we take stock, and will then see if I think it worth while to give you one.

Respectfully,

(S'g'd) GEO. MOEBS.

45 PL'FFS' EX. 7.

Office of G. Falk & Bro., leaf tobacco, 171 Water street, New York.

NEW YORK, *6th July*, 1880.

Geo. Moebs, Esq., Se'y & Tr. Pen. Cigar Co., Detroit, Mich.

DEAR SIR: We note the order given our Mr. Frankel and will gladly forward same and any other goods you may want if you will endorse the notes personally. You well know we sell you on the strength of yourself; and while the company notes are without doubt all right, we cannot use them in our bank or in the market without your private endorsement.

On those terms we will sell the Peninsular Cigar Co. anything it may need.

Awaiting your early favor, we are,

Very truly yours,

(S'g'd) G. FALK & BRO.

46 PL'FFS' EX. 8.

Peninsular Cigar Company, successors to Geo. Moebs & Co., 12, 14, 16, 18, & 20 Atwater St.

DETROIT, MICH., *July 10th*, 1880.

Mess. G. Falk & Bro., New York city.

GENTS: I was in Ohio for a week, and your letter came in when I was away; hence the delay.

I will with pleasure make notes to my order and endorse them.

Yours resp.,
GEO. MOEBS,
Sec. & Treasurer of Peninsular Cigar Co.

47 PL'FFS' EX. 9.

$1,061.24. DETROIT, MICH., *Aug. 4th*, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred sixty-one & $\frac{24}{100}$ dollars, at Merchants' & Manufacturers' National Bank, value received.

(S'g'd) PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

PL'FFS' EX. 10.

$1,075.94. DETROIT, MICH., *Aug.* 14, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred seventy-five & $\frac{94}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

(S'g'd) PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

PL'FFS' EX. 11. May 29, '84.

$535.50. DETROIT, MICH., *Sept.* 17, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred thirty-five & $\frac{50}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

(S'g'd) PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

PL'FFS' EX. 12. May 29, '84.

$476.63. DETROIT, MICH., *Sept.* 24, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., four hundred seventy-six & $\frac{63}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

48 PL'FFS' EX. 13.

$965.72. DETROIT, MICH., *Oct. 1st,* 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., nine hundred sixty-five & $\frac{72}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & tre's."

PL'FFS' EX. 14.

$1,456.74. DETROIT, MICH., *Oct.* 12, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., fourteen hundred fifty-six & $\frac{74}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

(Endorsed: "Geo. Moebs, sec. & treas."

PL'FFS' EX. 16.

$753.87. DETROIT, MICH., *Oct.* 23, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., seven hundred fifty-three & $\frac{87}{100}$ dollars, at Merchants' & Manufacturers' Nat. Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Geo. Moebs, sec. & treas."

49 PL'FFS' EX. 15.

$561.98. DETROIT, MICH., *Oct.* 22*d*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred sixty-one & $\frac{98}{100}$ dollars, at Merch. & Man'f. Nat'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: "Pay G. Falk & Bro. or order. Geo. Moebs, sec. & tre's."

PL'FFS' EX. 17.

$561.98. DETROIT, MICH., *Oct.* 29*th*, 1880.

One (1) month after date we promise to pay to the order of Geo. Moebs, sec. & treas., five hundred sixty-one & $\frac{98}{100}$ dollars, at Merch. & Man'f. N't'l Bank, value received.

PENINSULAR CIGAR CO.,
GEO. MOEBS, *Sec. & Treas.*

Endorsed: (Pay to G. Falk & Bro. or order. Geo. Moebs, sec. & treas.)

[Endorsed:] No. 6945. U. States circuit court, eastern district of Mich. Gustav Falk & Arnold Falk *vs.* George Moebs. Bill of exceptions. Griffin & Warner, for —. Filed Feb'y 27, 1881. Walter S. Harsha, clerk.

50 THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error sued out by the plaintiffs in the case of Gustav Falk and Arnold Falk against George Moebs; that the above and foregoing is a true copy of the record on file in my office in said cause; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof, with the original bill of exceptions.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this twenty-ninth day of May, in the year one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and ninth.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA, *Clerk.*

51 *Assignments of Error.*

The Circuit Court of the United States for the Eastern District of Michigan.

GUSTAVE FALK and ARNOLD FALK *vs.* GEORGE MOEBS.

And now come the above-named Gustave Falk and Arnold Falk, plaintiffs in error, by Levi T. Griffin, their attorney, and say that in the record and proceedings aforesaid and in the giving of the judgment aforesaid there is manifest error in this, to wit:

1. In that the court erred in sustaining the objection of defendant's counsel to the introduction of the notes in evidence offered by plaintiffs' counsel and in excluding said notes from the consideration of the jury.

2. In that the court erred in sustaining the objection of defendant's counsel to the introduction in evidence of the facts and circumstances appearing by the deposition of Arnold Falk, then on file in said court, and in ruling out said deposition.

3. In that the court erred in excluding from the consideration of the jury the facts and circumstances offered to be shown by
52 the deposition of Arnold Falk, then on file in said court, and in ruling out the testimony offered to be shown thereby.

4. In that the court erred in instructing the jury as a matter of law that the said plaintiffs had made out no case and that their verdict should be for the defendant.

5. In that the court erred in rendering judgment in favor of said defendant and against said plaintiffs.

Wherefore the said plaintiffs in error pray that the said judgment may be reversed.

GRIFFIN & WARNER.
Attorneys for Plaintiffs in Error.

We acknowledge receipt of copy hereof.
Dated March 6th, 1885.

DICKINSON, THURBER & HOSMER,
Att'ys for Def't.

[Endorsed:] 6945. U. S. circuit court, east'n dis't of Mich. Gustave Falk *et al. vs.* George Moebs. Assignments of error. Copy of original. Levi T. Griffin, att'y for pl'ffs.

Endorsed on cover: E. Michigan C. C. U. S. No. 243. Gustav Falk and Arnold Falk, plaintiffs in error, *vs.* George Moebs. Filed July 11, 1885.

SUPREME COURT

OF THE

UNITED STATES.

GUSTAV FALK and
ARNOLD FALK,
Plaintiffs in Error.
vs.
GEORGE MOEBS,
Defendant in Error.

No. 243.

BRIEF FOR PLAINTIFFS IN ERROR.

LEVI T. GRIFFIN,
Of Counsel.

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BRIEF FOR PLAINTIFFS IN ERROR.

LEVI T. GRIFFIN,
Of Counsel.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1887.

No. 243.

GUSTAV FALK and ARNOLD FALK, *Plaintiffs in Error.* *vs* GEORGE MOEBS, *Defendant in Error.*	Error to the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought in the court below to recover against the defendant upon his alleged endorsement of nine certain promissory notes, one of which, as a sample of the others, is in the following form:

$1,061.24. Detroit, Mich., Aug. 4th, 1880.

Four (4) months after date we promise to pay to the order of Geo. Moebs, sec. & treas., ten hundred sixty one & 24-1000 dollars, at Merchants' & Manufacturers' National B'k. value received.

PENINSULAR CIGAR CO.,
Geo. Moebs, Sec. & Treas.

Endorsed: "Geo. Moebs, sec. & treas."

These notes were given by the maker, The Peninsular Cigar Co., and endorsed by Moebs. in the form, which the notes bear, as the result of a correspondence between plaintiffs and Moebs in reference to the sale of a certain quantity of merchandize from plaintiffs to the Cigar Co.

See Record, p. 27, et. seq.

Moebs was the secretary and treasurer of that company. Previous to May, 1880, plaintiffs had sold goods to the Cigar Company, and taken the notes of that company, payable to their own order. In May of that year, they concluded not to take any more notes of the Cigar Company unless the same were endorsed by a responsible party. (Rec., p. 25.) Accordingly they wrote to Moebs the letter of May 28th, 1880, appearing upon the record, p. 27. Some correspondence, not particularly important to this question resulted, which may be seen upon pp. 27 and 28 of Record. About the time of the receipt of the letter of June 21, 1884, (Exhibit 6, p. 28), the Cigar Company through the defendant applied to plaintiffs' salesman for a bill of goods, amounting to $3,261.14. As soon as the plaintiffs learned of the application, they wrote to the defendant the letter, being dated July 6th, 1880, (pl'ffs' Exhibit 7), and being in the following words:

"Office of G. Falk & Bro., leaf tobacco, 171 Water street, New York.

New York, 6th July 1880.

Geo. Moebs, Esq., Sec'y & Tr. Pen. Cigar Co., Detroit, Mich.

Dear Sir: We note the order given our Mr. Frankel, and will gladly forward same and any other goods you may want if you will endorse the notes personally. You well know we sell you on the strength of yourself; and while the company notes are without doubt all right, we cannot use them in our bank or in the market without your private endorsement.

On those terms we will sell the Peninsular Cigar Co. anything it may need.

Awaiting your early favor, we are,

Very truly yours,

(S'g'd) G. FALK & BRO."

In reply, plaintiffs received from Moebs the letter of July 10th, 1880, (Pl'ffs' Ex. "8,") which is as follows:

Detroit, Mich., July 10th, 1880.

MESS. G. FALK & BRO.

New York City.

GENTS: I was in Ohio for a week, and your letter came in when I was away: hence the delay.

I will with pleasure make notes to my order and endorse them.

Yours Resp'y.

GEO. MOEBS,
Sec. and Treas. of
Peninsular Cigar Co.

Plaintiffs state, (pp. 25, 26,) that upon receiving the letter, and on July 12th or 13th, 1880, they commenced to ship to the cigar company a part of the goods which the company had applied to them for, and subsequently shipped all of that bill of goods, and continued after to fill orders for tobacco for the company, until they had shipped orders amounting, at the agreed prices, to $7449.60. From time to time as the goods were shipped, plaintiffs received the notes of the company, nine in number, for the entire amount of the goods sold. The notes were all, substantially, in the form hereinbefore set forth, and were all endorsed by Moebs in pursuance of the written correspondence between plaintiffs, and plaintiffs say distinctly, (Rec., p. 26.) *that the goods were sold and delivered solely and only relying upon the endorsement of said notes by Moebs. That they would not have sold or delivered the goods to the cigar company and taken their notes therefor, unless endorsed by the defendant; that they knew the defendant, and had confidence in his financial responsibility, but that they had no confidence in the financial responsibility of the cigar company, and that the goods were sold and delivered by plaintiffs relying upon the agreement of the defendant to make notes to his order and endorse them, as contained in the letter of July 10th, 1880.* (Exhibit "8.")

The notes were duly protested for non payment.

These facts were substantially set forth in a special count of plaintiffs' declaration, to which the common counts were appended. (Rec., p. 3, *et seq.*)

Defendant demurred to this count. (Rec., p. 15.)

This demurrer was subsequently brought on for

argument before the learned district judge, Hon. Henry B. Brown. Afterwards the cause of demurrer was ordered to be re-argued before a full bench, and the matter afterwards came on for argument before Circuit Judge Baxter and District Judge Brown, when an order was entered by the circuit judge sustaining the demurrer, the *district judge dissenting.* (Rec., p. 18.) The opinions of the learned judges may be found upon pp. 18 to 21 of record.

The plaintiffs' declaration also contained the money counts, under which plaintiffs would be entitled to recover, as well as under the special count, providing they were entitled to recover at all, under Howell's Statutes of Michigan, sections 7345, 7346 and 7347, which are as follows:

"7345. It shall be lawful for the holder of any bill of exchange or promissory note, instead of bringing separate suits against the drawers, makers, guarantors of the payment thereof, indorsers and acceptor of such bill or note, to include all or any of the said parties to the bill or note in one action, and to proceed to judgment and execution in the same manner as though all defendants were joint contractors.

"7346. The plaintiff in any such action, and in all other actions, on bills of exchange or promissory notes, may declare upon the money counts alone, and any such bill or note may be given in evidence under money counts, in all cases where a copy of the bill or note shall have been served with the declaration; and the sheriff's return of service of such copy upon the defendant or defendants, shall be *prima facie* evidence of such service.

"7347. In any such action, judgment may be

rendered for the plaintiff against some one or more of the defendants, and also in favor of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the respective parties shall appear, either upon confession, default, by pleading or upon the trial. * * * "

In *Wilcox vs. Sweet*, 24 Mich., 355, it was held that when a person sues under the common counts, and appends a copy of a negotiable instrument, it is an assertion that he is entitled to sue upon it in manner and form as set out.

The case was thereafter brought on to be heard before the court upon the issue remaining undisposed of, *under the money counts*, and the plaintiffs to maintain their case offered in evidence the notes with the certificate of protest, together with the facts hereinbefore substantially detailed. See bill of exceptions, Rec. p. 23-24.

The learned district judge, deferring to the opinion and decision of the circuit judge, excluded the notes and testimony, and thereupon directed a verdict for the defendant. It is from this, that the plaintiffs have taked a writ of error from this court.

I.

SPECIFICATION OF ERRORS RELIED UPON.

1. In that the court erred in sustaining the defendant's demurrer to the special count of plaintiffs' declaration.

2. In that the court erred in sustaining the objection of defendant's counsel to the introduction of

the notes offered in evidence by plaintiffs' counsel, and in excluding said notes from the consideration of the jury.

3. In that the court erred in excluding from the consideration of the jury the facts and circumstances appearing by the deposition of Arnold Falk, showing the circumstances under which said notes were given, and the understanding upon the basis of which the endorsements thereon were made.

4. In that the court erred in instructing the jury as matter of law that plaintiffs had made out no case, and that their verdict should be for the defendant.

5. In that the court erred in rendering judgment in favor of said defendant, and against said plaintiffs.

III.

ARGUMENT.

While the errors relied upon are distinct in form, yet they all relate to the right of the plaintiff to recover upon the notes in question, upon the state of facts appearing by the record, and the question may as well therefore, be argued as a whole.

The question briefly stated is as follows:

Previous to May, 1880, plaintiffs had sold goods to the Peninsular Cigar Company. George Moebs was secretary and treasurer of that company. Plaintiffs knew Moebs, and had confidence in his financial responsibility, but they had no confidence in the financial responsibility of the cigar company. They therefore concluded not to take any more notes of the cigar company, unless the same were endorsed by a

responsible party and they thereupon wrote Moebs to this effect, stating that they would gladly forward any goods the company might want, providing he, Moebs, would endorse the notes *personally*. In response to this request, Moebs promised and agreed to make notes payable to his own order, and endorse them. Upon the basis of this agreement, as evidenced by the written correspondence, plaintiffs shipped goods to the cigar company for which Moebs forwarded to plaintiffs the notes of the cigar company, substantially in form as agreed, made by the company, payable to his order, and endorsed by him, to which endorsement, however, he added the designations, "Sec. & Treas."

This endorsement was made directly in pursuance of his, Moebs, agreement to endorse the notes *personally*, and the plaintiffs relied upon the endorsement as his personal endorsement, and accepted the notes accordingly.

It is the endorsement upon the strength of which he, as secretary and treasurer of the company, *received the goods* in question, and it now remains to be seen whether or not it is an endorsement upon which he is *personally liable in accordance with his written undertaking*.

It was contended in the court below that the endorsement imported absolutely a corporate liability, instead of an individual liability, and that the written correspondence leading up to, and as a result of which, the endorsements were made, could not be received to modify or vary its terms and legal meaning, and thereby convert it into a personal obligation of the secretary and treasurer of the corporation.

This contention was sustained by the learned

circuit judge, though vigorously resisted by the learned district judge, in an able opinion, fortified by numerous decisions, which, it seems to us, leaves the question absolutely beyond contention.

Indeed, the opinion of the circuit judge, as it seems to us, disregards not only the most elementary rules as applied to a question of this character, but the decisions of this court, and other courts upon like questions.

It will be observed, in the first place, that the question is not between *remote* parties, but between *original* parties to the correspondence, which culminated in the delivery of the notes.

No question of protection to a *bona fide* holder is involved.

The agreement, in-so-far as this record shows, is undisputed. The intent is plain. There is no ambiguity. The purpose of the execution of the notes, and their endorsement by Moebs, was clearly to charge him as endorser, and the shipment was made by plaintiffs and the notes received by them, with the distinct understanding that the notes bore the endorsement of Moebs. Yet the circuit judge held, not only that the notes absolutely imported an obligation of the corportion, but that the exact relation, intention, understanding and agreement of these original parties, evidenced by their previous correspondence leading to it, and which for this purpose must be treated as contemporaneous with it, could not be shown to rebut that legal construction. Let us see.

First. *The endorsement does not, in law, import a corporate obligation, but, upon the contrary, imports an individual obligation of Moebs, the endorser.*

While there is some conflict in the authorities upon this question, yet it seems to us when the cases are analyzed and the paper itself taken into consideration they will be found mainly to support the contention that the indorsement in question is the individual indorsement of Moebs.

In *Carpenter vs. Farnsworth, 106 Mass., 561*, the court say, Mr. Justice Gray writing the opinion, that courts have always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties.

In *Slawson vs. Loring, 87 Mass., (5 Allen,) 340*, it appeared that a draft was drawn by one I. R. Jackson upon E. T. Loring, agent. Written across the face of the draft were the words: "Accepted June 15th, E. T. Loring, agent." Jackson was agent of the Portage Lake Manufacturing Company at Hancock, Michigan, and Loring was agent of the same company at Boston. The draft was duly indorsed and passed into the hands of Slawson, the plaintiff, for a valuable consideration.

The court in construing the draft says: "But there is another and broader view of the contract in which the parties entered, which is strongly indicative of an intent by the defendant to be bound by his acceptance. The instruments declared on purport to be bills of exchange, having a drawer and acceptor. *By putting their contract in such form, the intention of the parties must have been to issue paper which should have been received by those who took it in the usual course of business, according to the legal and ordinary effect which such form imports as giving to the holder the security of the names of the parties.*

Otherwise, if they intend to bind one party only, it is reasonable to suppose the bills would have been drawn by the company on itself, in which case the direction and request to pay would have been on the company by its name, and not upon an individual described only as an agent. The argument urged in support of the defense would pervert the bills into a contract different from that which they import on their face. *If they should be construed to be drafts by the company on itself, they would be in legal effect merely promissory notes on which the holder would have only the security of one name which would be contrary to the intent and purport of the instrument.*" *Thomas vs. Bishop*, 2 Stra., 955, and Rep. Temp. Hardw., 1; *Tabor vs. Cannon*, 8 Met., 456 460, were cited to support the text.

In *1 Daniell's Negotiable Instruments, section 415*, the rule is laid down that if a note be payable to an individual with the mere suffix of his official character, such suffix will be regarded as mere *descriptio personæ*, and the individual is the payee.

In *Chadsey vs. McCreery, 27 Ill., 253*, it was held that a note payable to *James B. McCreery, Treasurer of the R. I. & A. R. R. Co.*, is not a note to the company, but to the individual named, and that the addition to his name was merely *descriptio personæ*.

In *Robinson vs. Kanawha Valley Bank*, (Supreme Court of Ohio, Oct. 19th, 1886,) 8 N. E. Rep., p. 583, it was held that where a bill of exchange drawn by the Kanawha & Ohio Coal Co., upon "John A. Robinson, agent," and was accepted by him, "John A. Robinson, agent K. & O. C. Co.," that the

acceptance was a personal obligation of John A. Robinson.

The court say: "The fact that he is designated on the bill and described in his acceptance as agent does not vary the case.

The description of himself may, and no doubt did, serve a useful purpose in the settlement of his accounts with the company. The law as to notes and bills executed by persons acting as agents, or other persons, is not uniform, but as a rule where one acting as agent uses words that import a personal agreement on his part and signs his own name, it is held to be his individual obligation, although he describes himself as agent. The added words being regarded simply as a description of his person."

It was further held in this case, that usage has established an apparent exception in the instances where the bill is drawn or accepted by the cashier of a bank.

This exception is also recognized in Daniell's Negotiable Instruments, Volume 1, Section 417.

In *Tucker Manufacturing Co. vs. Fairbanks, 98 Mass. 101*, it was held that a mere description of the general relation or office which the person signing the paper holds to another person, or to a corporation, without indicating that the principal signature is made in the execution of the office of the agency, is not sufficient to charge the principal or to exempt the agent from personal liability.

In *Moss vs. Livingstone*, 4 N. Y., 208, similar rule was held.

In *Toledo Agriculture Works vs. Heisser*, 51 Mo., 128, it was held that a note made payable to C. H. Morris, agent, was payable to him personally. The

word agent after his name was a mere *descriptio personæ.*

In *Daniell's Negotiable Instruments, section 301,* (2 ed.,) the same doctrine was recognized.

Now applying these principles to the notes under consideration, it would seem to be clear that the endorsement was an individual endorsement of Moebs. There is nothing whatever upon the face of the paper tending to show that the notes, being payable to his order and being endorsed by him, was for the benefit of the company. In fact, the name of the corporation does not appear upon the notes except by its signature as maker. Under the ordinary rules of construction, the words "Sec. and treas." appended to his name in the note and endorsement, must be treated as mere *descriptio personæ.*

The learned District Judge seems to consider that this question was practically controlled in favor of its being the corporate endorsement, by the case of *Hitchcock vs. Buchanan,* 105 U. S., p. 416. In this case, the bill of exchange was headed, "Office of Belleville Nail Mill Co., Belleville, Ill.," and concluded with the words: "And charge the same to account of Belleville Nail Mill Co." Signed, "William C. Buchanan, president; James C. Waugh, secretary." Action was brought against Buchanan & Waugh. The court held that the instrument purported to be made at the office of the company and directed the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary.

"An instrument bearing on its face all the signs of being the contract of the principal," say the court, "cannot be held to bind the agents personally."

This case seems to us to be decidedly different from the case under consideration. The evidence upon the face of the instrument itself clearly showed that the debt was the debt of the company. It was drawn and headed at the office of the company, and the amount paid was to be charged to the account of the company.

Applying the principle of the *Aetna Mills* case, that the court would always lay hold of any indication on the face of the paper to enable it to carry out the intentions of the party, the court could not well do otherwise with all the evidence upon the face of the paper in that case, than to hold that the paper was a paper of the company and not of the individual.

We submit, therefore, that *Hitchcock vs. Buchanan*, is not an authority against the principle for which we contend, and that it must be held upon reason, as well as authority, that the endorsement in question upon its face, imports a personal obligation of Moebs and that *prima facie*, it is, in fact, the very liability which Moebs intended to convey to plaintiff, to-wit: his own personal liability upon the endorsement.

Second. *If we be not sustained in the foregoing contention, then we submit that the written evidence leading up to the endorsement and showing the intention of the parties in respect to it, and explaining the sense in which they regarded it, was admissible, and that the court therefore erred in excluding the notes and the accompanying testimony.*

We do not understand, as between the immediate parties to this contract, that any different rule applies

from that which applies to the construction of any other contract. It seems to us in any event, that the court cannot say absolutely as matter of law, that the indorsement in question imports absolutely the indorsement of the corporation. It does not in terms refer to the corporation. The notes were not made payable to the corporation. The utmost that can be claimed for the indorsement is, that it fails to show absolutely whether it was intended to bind the corporation or the individual; in other words, that the indorsement was ambiguous, and if ambiguous, there can be no question but that written evidence leading to and contemoraneous with it, may be resorted to for the purpose of giving proper construction to that indorsement.

Some of the established rules bearing upon this question may be adverted to.

In *Benjamin's Chalmers Digest of Bills, Notes and Checks*, page 65, note, the learned author lays down the rule that as between immediate parties, a contemporaneous writing, or a subsequent written agreement, may control the effect of a bill, subject to the same conditions that would be requisite in the case of an ordinary contract. Citing:

Brown vs. Langley, 4 M. & G. R., 466.
Salmon vs. Webb, 3 H. L. Cases, 510.
Maillard vs. Page, 5 L. R. Ex., 312.
Davis vs. Brown, 94 U. S., 423.
Wade vs. Wade, 36 Texas, 529.

The cases cited support the text. In *Wade vs. Wade*, 36 Texas, 529, it appeared that a certain note was indorsed in blank and was signed, "W. W., executor of D. W." The indorsement of the note was in

pursuance of a contract made between the parties, and the court held that this contract fully explained the object and purposes of the indorsement; that there was nothing in the agreement which bound the plaintiff in error to indorse or guarantee the payment of the notes, and that from the contract it was plain that Mrs. Wade on receiving the notes and, contemporaneously with the indorsement, realized all her claim in law against the estate of her deceased husband. The court further held that the words "executor of D. Wade" would not in the particular case exonerate the endorser from personal liability, as they must be treated merely as *descriptio personae*, but that the contract plainly showed that Wade acted in the premises only in his representative capacity.

This case is precisely in point it will be observed.

In *Haile vs. Peirce*, 32 Maryland, 327, relevant extraneous proof was admitted to show that a note signed by C. T. H., president; J. N. H. and J. G. D., directors; and E. R. S., secretary, was signed by said parties as agents for the company which they represented, and not in their individual capacity, for a debt due by the company, and that the appellee accepted it as such, with full knowledge that such was its character and purpose.

In *Detroit vs. Robinson, et al.*, 38 Mich., 108, Robinson *et al.* had brought a suit against the city to recover a balance, which was claimed to be due and owing to them on account of materials furnished, and work and labor done in paving one of the streets of the city.

The board of public works had advertised for proposals to do this work, and a written proposition was

made by Robinson in answer thereto, offering to do the work specified in the advertisement, and the contract in question in the case resulted therefrom. *Certain correspondence had previously taken place between Robinson and Farwell and the board of public works, which tended to show that the parties understood what the amount involved in the contract would be.*

The court held that all the writings belonged together, and that they should be resorted to for the purpose of settling or assisting in so doing, any question arising and growing out of the uncertainties and ambiguities of the contract. The court say: "*When we come to examine this contract in the light of the previous writings, this case may be disposed of according to simple and well established elementary rules.*"

In *Singer Manufacturing Co. vs. Haines*, 36 Mich., 385, a note was taken on the sale of a sewing machine, and at the same time a writing was received back in regard to paying for it in work. The court held that the note and writing should be taken and construed together, in order to show the true nature of the transaction.

In *Lee vs. Dick*, 10 Peters, 482-493, a contract of guarantee was construed by referring to certain letters which preceded and accompanied the guarantee itself.

In *Daniel's Negotiable Instrument*, Vol. 1, page 72, it is said that a contemporaneous written agreement may be proven to *control the effect of negotiable or other instrument as between the immediate parties*, and those having notice.

See also Sec. 418, 419.

In *R. F. & P. R. Co. vs. Snead*, 19 Grat., 354, a due bill was signed by one "Ed. Robinson," in full of labor performed on cottage lot *of the railroad company*."

Suit was brought against the railroad company for the amount of the due bill, and the plaintiff gave the due bill in evidence.

The court held that it did not distinctly appear from the terms of the paper whether it was designed to acknowledge a debt due by Robinson, who signed the paper in his own name, or by the company whose officer and agent he was, and upon whose road the work is stated to have been done.

The court say: "The language is ambiguous and consistent with either view, and parol evidence of the consideration and of the origin of the paper is admitted to explain its meaning in this respect. *Early vs. Wilkinson*, 9 Grat., 68; 1 Am. Leading Cases, 606, 3rd edition, notes to *Rathbone vs. Budlong; Nash vs. Towne*, 5 Wall., 639. That would be so, even if the action were founded on the paper itself. It is so a *fortiori* where the action, as in this case, was founded on the original consideration"

Upon the evidence, the court affirmed the verdict of the court below, holding that the railroad company was liable.

Smith vs. Alexander, 31 Mo., 193. In this case, the rule is well and succinctly stated. A note had been signed in the following form: "*J. H. Alexander, Treas'r Ohio & Miss. R. Co.*"

There were no other indications upon the face of the paper as to whether the party signed it in his individual or representative capacity.

The court refers to the great diversity in the form of instruments involving questions of this character, and say:

"In some of the authorities cited, the execution of the instrument in the form of that before us, has been held the individual obligation of the person signing it, and not that of the individual or company indicated by the addition to the signature, such addition being regarded merely as *descriptio personarum*, while in others it has been held sufficient on its face to avoid personal liability. Although it would appear to be by no means settled that such a mode of execution—the mere addition of the official character to the name—is tantamount to a disclosure of personal responsibility, it is deemed such an indication of the representative character, as to warrant a resort to parol evidence, not of course, to contradict or vary the writing, but to explain it. The purpose of introducing parol evidence in such cases is to prove extrinsic circumstances by which the respective liability of the principal and agent may be determined, such as to which the consideration passed and credit was given, the agent's authority, &c. *When the names of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument, as it stands, is consistent with either view of its being the engagement of the principal or the agent,* parol evidence is admissible in a suit against the agent to charge him by showing either that credit was given to him, or that he had not authority to bind the principal, or to discharge him by proving that the consideration passed directly to his principal."

Mechanics' Bank vs. Bank of Columbia, 5 Wheat, 336, is cited, among other cases, to sustain the principle stated, to which we shall refer later on.

In *McClellan vs. Reynolds*, 49 Mo., 313, 314, it was held that the facts did not, as was claimed, go to vary a written instrument but only *to explain a latent ambiguity.*

See Shuetze vs. Bailey, 40 Mo., 69.
Musser vs. Johnson, 42 Mo., 74.

A like doctrine prevails in Minnesota.

Pratt vs Baupre, 13 Minn, 189. In this case, Temple & Baupre signed a carriage contract as "*Agents Steamer Flora.*" Suit was brought against Baupre as surviving partner of Temple & Baupre, to recover damages for breach of contract.

The court held that the words, "*Agents Steamer Flora,*" attached to the signature, were *descriptio personarum*, and say:

"The rule is that when words, which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of the contracting party, *prima facie*, they are descriptive of the person only; but the fact that they were not intended by the party as descriptive of the person, but were understood as determining the character in which the person contracted, may be shown by extrinsic evidence, but the burden of proof rests upon the party signing, to change the *prima facie* character of the contract."

Kean vs Davis, 21 N. J., 683. This is a strong and well considered case upon the general question involved, and we beg the privilege of citing rather fully from it.

An action was brought upon a bill of exchange, drawn by one "*John Kean, President Elizabethtown & Sommerville R. R. Co.*," upon William Thompson, payable to the order of Elizabethtown and Sommerville R. R. Co.,

The bills were accepted by Thompson, and were endorsed "Elizabethtown & Sommerville R. R Co., by John Kean, President." Suit was brought against Kean. Proofs were offered by the defendant, by way of defense, to the effect that Kean was president of the railroad company, and that the bill was drawn by him under direction of the board of directors, and was delivered to plaintiffs by an agent of the company, in payment for iron sold and delivered by the plaintiffs to the company, and that at the time of the delivery of the bills to the plaintiffs, they were informed that the company were the drawers of the bills.

This evidence was objected to and overruled, and the court charged the jury, that the bills were the bills of John Kean, and that whether they were drawn by the company was a question of law. Error was alleged, and the court of errors and appeals of New Jersey, unanimously reversed the judgment.

The court in considering the question say :

"The leading inquiry in this case unquestionably is : *Whose contracts are these ?* Are they the personal contracts of John Kean, or are they the contracts of the Elizabethtown & Sommerville R. R. Co.? For the purposes of legal investigation, this inquiry is resolvable into two, viz

1. By whom do these bills purport to be drawn ?
2. If, upon the face of the instrument, it is

doubtful whose contracts they are, is parol evidence admissible to determine their true character?

"1. Upon the face of these instruments, independent of authorities, it may be safely averred that it does not clearly appear whether the drawing of the bills was designed as the act of the corporation, or the act of the individual. This identical form of signature may create an obligation, either upon the corporation, or upon the individual, according to the terms made use of in the instrument."

The court then refers to numerous cases where signatures have been deemed the signature of an individual.

The chief justice in delivering the opinion, and after citing different analogous cases, seems to regard it as the *better* opinion that the obligation is upon the agent, and not upon the principal, citing Story, and says:

"Thus uncertain is the rule of construction adopted by judicial tribunals, of the effect of a signature like that under consideration, and if the present obligation is to be deemed *prima facie* as creating a personal obligation upon the agent, and not upon his principal, it is clearly a construction in aid of the holder of the paper, founded upon principles of policy or necessity, but resting upon no clearly expressed intent of the party. It is at best, upon the face of the instrument, doubtful by whom they were executed. It is not clear who was the contracting party; whether the obligation was assumed by the agent, or whether he contracted on behalf of his principal."

The court then considers the second head, to wit: whether extrinsic evidence might be resorted to to remove the doubt, and says:

"The objection urged to the evidence is that the contract is in writing; that the construction of an agreement, is a matter of law, to be settled by the court upon the terms of the instrument itself, and that evidence *aliunde* cannot be received to contradict or to vary the terms of a valid written instrument. It is material to observe that the body of this instrument contains not a word indicating by whom the contract was made. The language of the instrument is clearly applicable to a contract made by the individual or by the corporation, and it cannot be said that this evidence will either contradict or vary the terms of the instrument. The whole difficulty lies, not in the construction of the instrument, but in the import of the signature. The signature, as we have seen, may import either the act of the company, or of the individual. *The terms of the instrument are neither varied, nor contradicted, by proof that it was the contract of the one or the other. The question is not what is the true construction of the language of the contracting party, but who is the contracting party; whose language is it, and the evidence is not adduced to discharge the agent from a personal liability, which he has assumed, but to prove in fact that he never incurred the liability; not to aid in the construction of the instrument, but to prove whose instrument it is.*

"Now, it is true that the construction of a written contract is a question of law to be settled by the court upon the terms of the instrument, but whether the contract was in point of fact executed when it was made, *and by whom it was made*, are questions of fact to be settled by a jury, and are provable in many

instances by parol, though even the proof conflicts with the language of the instrument itself."

The court then proceeds to consider a number of cases bearing upon the question, and then says:

"The cases which have been cited, we think fully establish the principle that where it is doubtful upon the face of the instrument, whether it was designed to operate as a personal engagement of the party signing it, or otherwise, parol evidence is admissible to show the true character of the transaction.

"Nor do I apprehend that this doctrine is anywise in conflict with the leading cases cited and relied upon by the counsel for the defendants in error. In most, if not all the cases, where parol evidence has been rejected, it will be found that the contract was clearly in the name of the agent and not the principal. That the evidence was offered, not to show who was in truth the contracting party, but to relieve the party contracting, from the effect of the obligation, which he had clearly assumed, by proving that at the time of the contract, he was acting as agent. * * * * * * * * Upon the whole, I am of the opinion that though these bills unexplained would be deemed *prima facie* to be the individual bills of John Kean, yet, inasmuch as it is doubtful upon their face what was the intention of the contracting parties, and *who are the real drawers;* inasmuch as the name of the principal appears upon the face of the instrument, and an action may be maintained thereon against the principal, and inasmuch as the evidence offered, in no wise contradicts the language of the instrument itself, I am of the opinion that the evidence offered and rejected in the court below was competent, and that the court erred in overruling it.

"In arriving at this conclusion, I do in no wise dissent from many of the legal positions contained in the opinion of the court below. On the contrary, I yield to them my own concurrence, sustained, as they are, by much learning and great weight of authority. I have no wish or purpose to say ought tending to shake the stability or to violate the sacredness of written contracts, but where upon the face of the instrument it is doubtful who is the contracting party, both reason and authority authorize the production of extrinsic evidence to remove that doubt."

In a note to *Pentz vs. Stanton*, 1 Am. Leading Cases, 453, (5th Edition, 762, 763), will be found a collection of the authorities upon the point involved in the present case. Many authorities are reviewed, and the following conclusion was reached:

"The extent of the principle as to the admissibility of parol evidence appears to be this. Where the name of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal so that the instrument, as it stands, is consistent with either view of its being the engagement of the principal, or of the agent, parol evidence is admissible in a suit against the agent, to charge him by showing either that a credit was given to him, or that he had no authority to bind the principal by that contract, which would create a consideration for the liability on his part, or to discharge him by proving that the consideration passed directly to his principal, as, that credit having been given to the principal alone, the consideration of the note signed by him was an antecedent liability on the part of the principal, and that

the other party knew that he acted as agent, and thus destroying all consideration for a liability on his part, and in like manner to charge or discharge the principal by similar circumstances.

"But if the name of the principal does not appear in the instrument, and the instrument is wholly without ambiguity, and asserts a positive liability on the part of the person contracting, parol evidence, to bind the principal, or to discharge the agent, is not admissible."

A large number of cases are cited to sustain the text.

Hood vs. Hallenback, 7 Hun. N. Y., 362, will repay a careful perusal. Many of the New York cases in the various courts, including the court of appeals, are reviewed and cited.

Five persons were sought to be charged as makers of a promissory note, which they signed as "*trustees of St. John's Ev. Lutheran Church, Hudson, N. Y.*" They set up as a defense that the note was accepted as an obligation of the corporation.

The court held that the note in suit, *prima facie* created a *personal* obligation against the makers, but being signed with descriptive words attached to their names, and bearing also the corporate seal, the case was open to proof of the facts under which it was given with a view to determine whether it was intended by the parties that they should assume personal liability.

In *Angell and Ames on Corporations*, sec 296, the learned author lays down the rule in cases like this now before the court, that if from the contract itself, or from this, *coupled with the conduct of the parties bound to it*, it appeared that credit was not

given to the agent, but to the corporation, and that it was the intent of the parties that the corporation should be bound, whatever might be the particular form of the contract, the corporation is alone liable upon it.

Finally, we come to the decisions of this court, and we strenuously contend that the decisions of this court, in favor of the admission of parol evidence, to show in what capacity, and with what purpose and intent an endorsement of this character is made, is placed beyond question. We cite the court to the case of the *Mechanic's Bank vs. The Bank of Columbia*, 5 Wheat., 326, a case which runs through most all the decisions discussing this question, since the case was decided, and which has furnished inspiration and guidance for many of the judges and courts who have been called upon to determine the question. The case was the converse of the one at bar, and is as follows:

An action was brought against the Bank of Alexandria by the Bank of Columbia, upon a check in the following form:

"Mechanics Bank of Columbia, June 25th, 1817.
Cashier of the Bank of Columbia:

Pay to the order of P. H. Miner, Esq., ten thousand dollars.

(Signed) WILLIAM PATON, JR."

The question arose as to whether the check was drawn by Paton, cashier, as a *private* or an *official* act. It was contended by the defendants, (p. 330,) that the character of the check could only be decided by the check itself, and that no parol or other testi-

mony could be received to explain the same. The court below, however, gave it as their opinion that the check was, in connection with the other evidence offered, proper and competent evidence in the case, and that it was competent to prove by parol or other testimony that the check was drawn under such circumstances as justified the plaintiffs in considering it as an official check, and paying it as such, and charging the same to the debit of the defendants.

The opinion of the court was delivered by Mr. Justice Johnson who says: "The question is, whether a certain act done by the cashier of a bank was done in his official or individual capacity. Had the draft signed by Patton born no marks of an official character on the face of it, the case would have presented more difficulty; but if marks of an official character not only exist on the face of it, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensible."

At page 336, the court say: "The evidence on the face of the bill predominates in favor of its being a bank transaction. Applying then, the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence, could have been only applicable to himself. *But it is enough for the purpose of the defendant, to establish that there existed on the face of the paper, circumstances from which it might reasonably be inferred that it was either one or the other. In that case it becomes indispensible to resort to extrinsic evidence to remove the doubt.*"

The case is a much stronger one than the case at bar. The check upon its face was clearly the indi-

vidual check of Patton, and there were no indications of an official character upon the face of the check whatever; yet the supreme court held that extrinsic evidence might be received to show the character in which the check was signed, and it is for the present application of this plain principle of law, as established and recognized by this court, for which we most urgently and strenuously contend.

So in *Martin vs. Cole*, 104 U. S., p. 30, an action was brought by Cole as indorsee, against Martin as immediate indorser. The defendant, as a defense, offered to prove a *parol* promise contemporaneous with the indorsement of the note, to the effect that he was not to be called upon as an indorser or guarantor of its payment in the event the plaintiff failed to collect it from the maker. An objection to this proof was sustained, and the defendant excepted. This court held, (p. 35,) that the rejection of the offer fairly raised the issue intended to have been made by the special plea, whether it is competent in an action against an indorser by his immediate indorsee, to prove as a defense, that, as a part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse. The court say: "It has never been contended that such defense, based upon dealing between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper acquired before maturity, in the usual course of business, and without notice; for the protection of such a title is of the essence of the policy of the law merchant, and inheres in the very definition of the negotiability. Hence, in

that case, a collateral but contemporaneous written agreement, between two prior parties to a bill or note, would not affect its validity in the hands of a holder, more than if the agreement were unwritten; whereas between the immediate parties, if the agreement relied on were in writing, its terms would fix and determine their rights and obligations as was decided by this court in *Davis vs. Brown*, 94 U. S., 427. The question is between them alone, and is, whether the same effect will be given to such an agreement *not reduced to writing*."

The court, after citing and examining numerous cases, held that *parol* evidence was not admissible to change the character of the implied contract arising by the instrument; but we submit it as an authority bearing upon the admission of the previous and contemporaneous writings, evincing the understanding of the parties as to the construction, purport and intention of the instrument in question.

The learned circuit judge seemed to regard this last case as being decisive of the question against the introduction of such evidence, but it will be observed that that case only involved the admissibility of *parol* evidence to affect the contract, while in the case at bar it was the previous and contemporaneous *writings* indicating the agreement of the parties which was sought to be introduced in evidence, and if we understand the case of *Martin vs. Cole* correctly, that case expressly decides that such testimony is admissible.

In *Brawley vs. U S.*, 96 U. S., 173, it was held that previous and contemporary transactions and facts, may be very properly taken into consideration to ascertain the subject matter of a contract, and the

sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

In *Davis vs. Brown*, 94 U. S., 423. suit was brought against the defendants as second indorsers upon certain promissory notes. The defense set up to defeat the action was that the notes were indorsed by the defendants as a mere matter of form upon an agreement in writting, that they should not be held liable on their indorsements.

The court held that the evidence was admissible, and say: "The objection that the agreement was inadmissible, because it tended to vary and destroy the legal effect of the indorsement is not tenable. *The agreement being in writing, is to be taken and considered in connection with the indorsement, and the two are to be construed together.*"

This case would seem to be decisive, inasmuch as extraneous evidence was held admissible to give effect to the indorsement of the parties, and to show what the intention and desigh was in making that indorsement.

In *Baldwin vs. Bank, etc.*, 1 Wallace, 234 239, it appeared that the Bank of Newberry, a corporation, brought an action of assumpsit against one Baldwin, upon a promissory note. It was contended, that *parol evidence* was not admissible to prove that the person named therein as payee, acted as cashier and agent of the corporation. "Counsel very properly admit;" the court say, "that such evidence would be admissible in suits upon ordinary simple contracts, but the argument is that a different rule prevails where the suit is upon a promissory note or bill of exchange."

question of showing whether an endorsement was an *official* or *individual* act. The simple question was, the character being conceded, whether *parol* evidence was admissible to change, vary or contradict the absolute liability imported by the contract of endorsement. While the court, very properly held that parol evidence could not be received to contradict or vary the instrument, while contemporaneous writings might be so received, yet, it will be seen, that the questions are not at all analogous. If we concede them to be so, yet in that case the rule for which we contend is applied and recognized that the contemporaneous writings might be received to show what was intended by the contract.

We submit, therefore:

(1) That the notes themselves *prima facie* imported a personal and individual liability of the defendant, and that they should have been received in evidence as fixing *prima facie* a liability upon the defendant, exclusive of other extrinsic evidence.

(2) That in any event, evidence should have been received showing the facts and circumstances under which said notes were executed and delivered by Moebs and received by the plaintiffs, and to whom the credit was actually given upon the endorsement, and that the court erred in excluding such testimony, and in directing a verdict for the defendant.

LEVI T. GRIFFIN,

Of Counsel.

FILED
APR 15 1888
JAMES H. MCKENNEY
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Supreme Court of the United States.

October Term, 1887.

GUSTAV FALK AND
ARNOLD FALK,
Plaintiffs in Error,

vs.

GEO. MOEBS,
Defendant in Error.

In Error to the Circuit Court of the United States, for the Eastern District of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

DON M. DICKINSON,
ELLIOTT G. STEVENSON,
Counsel for Defendant in Error.

DETROIT:
John F. Eby & Co., Printers, 65 & 67 West Congress St.
1888.

question of showing whether an endorsement was an *official* or *individual* act. The simple question was, the character being conceded, whether *parol* evidence was admissible to change, vary or contradict the absolute liability imported by the contract of endorsement. While the court, very properly held that parol evidence could not be received to contradict or vary the instrument, while contemporaneous writings might be so received, yet, it will be seen, that the questions are not at all analogous. If we concede them to be so, yet in that case the rule for which we contend is applied and recognized that the contemporaneous writings might be received to show what was intended by the contract.

We submit, therefore:

(1) That the notes themselves *prima facie* imported a personal and individual liability of the defendant, and that they should have been received in evidence as fixing *prima facie* a liability upon the defendant, exclusive of other extrinsic evidence.

(2) That in any event, evidence should have been received showing the facts and circumstances under which said notes were executed and delivered by Moebs and received by the plaintiffs, and to whom the credit was actually given upon the endorsement, and that the court erred in excluding such testimony, and in directing a verdict for the defendant.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

Plaintiffs in error brought suit in the court below upon nine promissory notes of the Peninsular Cigar Company, upon which they sought to charge the defendant in error personally, as indorser. The notes in form were all alike, except as to amounts and the time of payment, and were as follows:

$1,061.24. DETROIT, MICH., Aug. 4th, 1880.

Four months after date we promise to pay to the order of Geo. Moebs, sec. and treas., ten hundred and sixty-one and $\frac{24}{100}$ dollars at the Merchants and Manufacturers' National Bank, value received.

PENINSULAR CIGAR COMPANY,
GEO. MOEBS, *Sec. and Treas.*

Indorsed on back, "Geo. Moebs, Sec. and Treas."

The first count of the plaintiffs' declaration was special, and alleged in substance that on July 6th, 1880, defendant was the secretary and treasurer of a body corporate known as the Peninsular Cigar Company, then engaged in the business of manufacturing, buying and selling cigars and tobacco in the city of Detroit. That plaintiffs were then doing business as tobacco merchants in New York City. That the defendant as secretary and treasurer of said Peninsular Cigar Company applied to plaintiffs for the purchase of certain merchandise and offered in payment therefor the notes of said Peninsular Cigar Company; and it was then agreed between the plaintiffs and defendant that plaintiffs were thereafter to sell and deliver the merchandise so applied for and any other goods which defendant in behalf of said company, might thereafter apply for, and that in payment therefor the defendant should execute and deliver to the plaintiffs the notes of the said Peninsular Cigar Company payable to the order of said defendant, and by him personally indorsed to said plaintiffs.

That said defendant thereafter ordered from the plaintiffs certain merchandise of the value of $7,449, and, in accordance with said agreement, and in payment for said merchandise, the defendant, upon the several dates indicated and specified in the several promissory notes hereinafter mentioned, *and with the intent and design of binding, charging and obligating himself* as an indorser upon said notes, with the liability of an indorser as defined by the Law Merchant, made, executed and delivered to the plaintiffs nine certain promissory notes.

To this special count was added the common counts in assumpsit, with a notice thereunder written that the plaintiffs would, under the money counts, give in evidence nine certain promissory notes, copies of which were set out, and in which notice it was stated that said notes would constitute the sole bill of particulars of the plaintiffs' demand.

To the special count in plaintiffs' declaration the defendant demurred and to the common counts in said declaration pleaded the general issue. At the March (1885) term of said court the defendant's demurrer to the special count in plaintiffs declaration was argued and the demurrer sustained. Notwithstanding the demurrer to plaintiffs' declaration had been so sustained, at the November term of said court the plaintiffs brought said cause on for trial upon the issue framed upon the common counts embraced in plaintiffs' declaration, and upon the trial, which was had before said court and a jury, the plaintiffs offered in evidence the notes referred to and which were excluded as not evidence of the personal liability of defendant, as was also the deposition taken upon behalf of the plaintiffs, for which it was claimed that it tended to show that it was the intention of the defendant to bind himself personally in making the indorsement upon said notes—George Moebs, Secretary and Treasurer. And upon the ruling of the court excluding the notes and deposition offered upon such trial, error is alleged. No exception was taken to the opinion and judgment of the court sustaining the demurrer to the special count of plaintiffs' declaration, nor is error assigned upon such opinion or judgment.

QUESTIONS FOR CONSIDERATION.

I.

Whether the notes sued upon, by their terms, establish a personal liability as against the defendant?

II.

If the notes, by their terms, did not fix and establish a personal liability against the defendant, was it competent to show

upon the trial, by evidence, partly written and partly oral, that the act of making the indorsement officially was a mistake, and that it was the intention of the defendant, in making the indorsement, to execute his personal indorsement instead of official?

III.

If such evidence was competent, was it admissible under the pleadings and issue as framed, and upon which the trial proceeded?

IV.

If such evidence was not admissible under the pleadings and issue framed, upon which the trial proceeded, will this court review the opinion and judgment of the court below in sustaining the demurrer to the special count in plaintiffs' declaration—error not being assigned upon such opinion or judgment.

First Question.

Whether the notes sued upon by their terms establish a personal liability as against the defendant?

In considering this question it should be borne in mind that each of the notes sued upon, upon its face shows that the defendant was the secretary and treasurer of the Peninsular Cigar Company, and when the notes by their terms were made payable to the order of George Moebs, secretary and treasurer, we submit that the legal effect of such notes was the same as if the name of the Peninsular Cigar Company had been inserted as the payee of the notes.

This question was considered by this court in the case of *Hitchcock vs. Buchanan*, 105 U. S., 416, the opinion and

judgment in which, we submit, determines this question negativing the defendant's liability. It was an action in assumpsit brought by Hitchcock as indorsee against Buchanan and Waugh as drawers of a bill of exchange, of which the following is a copy:

"OFFICE OF BELLEVILLE NAIL MILL COMPANY,
$5,477.13. BELLEVILLE, ILL., December 15, 1875.

Four months after date pay to the order of John Stephens, Jr., cashier, five thousand four hundred and seventy-seven and thirteen one hundredths dollars, value received, and charge same to account of Belleville Nail Mill Company.

WILLIAM C. BUCHANAN,
President.

JAMES C. WAUGH,
Secretary.

To J. H. Piper, Treasurer, Belleville, Ills."

Mr. Justice Gray, delivering the opinion of the court, says: "The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Company, and not of the individuals, by whose hands it is subscribed. * * * * *The allegations in the declaration that defendants made their bill of exchange is inconsistent with terms of the writing sued on and made a part of the record, and is not admitted by the demurrer.*"

Carpenter vs. Farnsworth, 106 Mass., 561, was a suit brought against Farnsworth as the drawer of a bank check drawn on the Boston National Bank, of which the following is a copy:

"BOSTON NATIONAL BANK,
$19 20. BOSTON, September 9, 1879.

Ætna Mills. Pay to L. W. Chamberlain or J. E. Carpenter or order nineteen and twenty one-hundredths dollars.

I. D. FARNSWORTH,
Treasurer."

Upon presentation to the Boston National Bank payment of the check was refused and notice given to the defendant. It was held, Mr. Justice Gray delivering the opinion of the court, that the check was the check of the Ætna Mills, and executed by Farnsworth as a treasurer, in their behalf, and bound the corporation, and not the treasurer personally. An examination of the check sued upon will show that no reference was made to the Ætna Mills, except on the margin of the check, indicating that it was on a blank used by the Ætna Mills.

Sayre vs. Nichols, 7 Cal., 535, was an action brought by Sayre against Nichols upon a draft after protest for non-payment, of which draft the following is a copy:

"ADAMS & COMPANY'S EXPRESS AND BANKING HOUSE,
$3,000.00. MORMON ISLAND, February 21st, 1855.

Pay to A. G. Sayre or order three thousand dollars, value received, and charge same to account of this office.

C. P. NICHOLS.
Agents.
per G. W. COREY,

To Messrs. Adams & Company, Sacramento."

It was sought to charge C. P. Nichols personally as drawer of the bill. Burnett, J., delivering the opinion of the court, says: "When the party appends to his name the place of his residence I can well understand that he intends by this a description of the person, but when he appends the term "Agent" or other term of like import, I cannot understand it as a description of the person, but I take it to be a clear designation of the *capacity* in which the party acts. To use the general word agent as a description of a particular person would seem to be entirely improper. * * * I cannot believe that a person signing his name and appending the word agent to it ever did intend anything else than a designation of the capacity in which he acted. If a party signed a promissory note and append to his name the word "surety," he only means to bind himself *as such* and not as

principal. So if a party appends to his name the word agent he clearly designates the capacity in which he acts, *and he thus designates such capacity for the purpose of showing that he intends to bind himself only in that capacity.* By assuming to act as agent he does guarantee his authority thus to act and no more. The party who takes the paper is not bound to take it in that form. He is bound to know the contents of the paper, and knowing the contents of the paper he is bound by the express intention of the party signing it. The rule that the word agent appended to the name of the agent is merely a description of the person is not, in my view, sustained by common sense; and when a rule is not sustained by common sense, well understood and legitimately applied, it is certain to be wrong."

Garton vs. Union City National Bank, 34 Mich., 279, was a suit brought by the bank against Garton, upon a note of which the following is a copy:

$1,000. "UNION CITY, MICH., May 12th, 1873.

On demand after date I promise to pay to C. F. Allen, cashier, or order, one thousand dollars at Union City National Bank, value received, with exchange on New York, and interest at ten per cent. after maturity.

JANE GARTON."

Mr. Justice Graves, delivering the opinion of the court, says: "It is said the note was wrongly admitted in evidence, because it was made payable to the order of Allen and is not indorsed by him. No indorsement was necessary. The instrument plainly indicated that it was made to Allen, not as an individual but as a bank officer, and that it was a contract with the bank."

Bank of Genesee vs. The Patchin Bank, 19 N. Y., 312. S. B. Stokes, cashier of the Bank of Genesee sent to the Patchin Bank to be discounted a bill of exchange dated ten days previous, payable to the order of S. B. Stokes, cashier, and indorsed by him with the same addition, and

inclosed in a letter dated at the banking house, signed S. B. Stokes, cashier. It was held that the indorsement was that of a bank and not the personal indorsement of S. B. Stokes.

Vater vs. Lewis, 36 Ind., 288, an action upon a note payable to the order of Charles W. Smith, treasurer of the I. M. B. Company (Indianapolis Machine Brick Company), was held to be a contract with the corporation and not Smith as an individual, and that his designation of treasurer was not merely the description of a person.

Babcock vs. Beaman, 1st E. D. Smith, 593—in Court of Appeals, 1st Kernan, 200, it was held a note payable to the order of R. Beaman, treasurer—he being treasurer of the Union Manufacturing Company—was the note of a corporation and not of Beaman individually.

Arlington vs. Hinds, 1 Deh., (Vt.) 431. A promissory note was made payable to Luther Stone, town treasurer, or his successors in office. It appearing by evidence *aliunde* that Stone was treasurer of the town of Arlington. It was held to be the note of the town, and that the town could maintain an action upon it.

Bank of Manchester vs. Slason, 13 Vt., 339. A bill of exchange was indorsed by the payee, "Pay to M. Clark, Esq., cashier." It appearing by evidence introduced that Clark was at the time cashier of the Bank of Manchester, and the bill indorsed in a transaction in which the bank alone was interested. It was held the bank could maintain an action upon it.

To the same effect see *Farmers & Mechanics' Bank vs. Day*, 13 Vt., 36.

Many other cases might be cited to sustain the same position, and while there may be found many perhaps in conflict with those cited, we submit that it can no longer be considered an open question in this court, but that the question was settled by the decision in the case of *Hitchcock vs. Buchanan*, 105 U. S., 416.

SECOND QUESTION.

If the notes by their terms did not fix and establish the personal liability against the defendant, was it competent to show upon the trial by evidence, partly written and partly oral, that the act of making the indorsement officially was a mistake, and that it was the intention of the defendant in making the indorsement to execute his personal indorsement instead of official?

If we are right in the position taken with reference to the first question considered, and it shall be held that the papers sued on in legal effect were the same as though the Peninsular Cigar Company was named as payee in the note and indorser upon the same, it would seem to follow that there would be little room for discussion upon the second question. The position taken by the plaintiffs in error would amount to permitting a reformation of a contract in an action at law. The position, as we understand it, of the plaintiffs, is that they had a right to show that notwithstanding by the terms of the contract the Peninsular Cigar Company by George Moebs, secretary and treasurer, made its paper payable to its own order and rendered it negotiable by its own indorsement; it was intended, in fact, to make it payable to George Moebs individually, and that George Moebs intended to have indorsed the paper instead of the Peninsular Cigar Company.

In the consideration of this question we contend that unless the identity of the Peninsular Cigar Company and that of Mr. Moebs should be entirely ignored, it necessarily follows that by the position taken by plaintiffs they contend for the right to reform a written contract in an action at law and to enforce the reformed contract in the same action. There is no ambiguity in the contract as executed. We are not left in doubt as to who was meant

by George Moebs, secretary and treasurer, for it appears on the face of the note that he was the secretary and treasurer of the Peninsular Cigar Company, and such is the allegation made in the special count of plaintiffs' declaration, in which is made the further one that the notes were given in payment for merchandise purchased for the corporation. We therefore insist that no case is presented which would permit the introduction of extrinsic evidence to show that the notes sued on were made payable to George Moebs, and indorsed by him in a different capacity than that appearing on the face of the notes. If it is admissible for the plaintiffs to show that it was the intention to have made the paper payable to George Moebs individually, and the intention of George Moebs to have indorsed it as an individual, then it would necessarily follow that had the paper been payable to George Moebs individually and George Moebs individually had indorsed it, it would be permissible to show the fact that he intended to indorse it as an agent or as secretary and treasurer—in either case it would be permitting an unambiguous and perfectly intelligible provision of the notes sued on to be altered and varied by extrinsic evidence.

In the case of *Carpenter vs. Farnsworth*, cited above, in considering the question as to whether the defendant Farnsworth, who signed a check "I. D. Farnsworth, Treasurer," was personally liable or not, Mr. Justice Grey, in his opinion, delivered, said: "The question must in all cases be determined from the instrument itself."

Mr. Justice Burnett, discussing the same question, in the case of *Sayre vs. Nichols*, cited above, approves of the following rule: "When one makes a written contract, intending to act therein as agent of another and to bind his principal, it is necessary that it should appear by the contract itself that he acts as such agent. Oral testimony is not admissible to contradict, vary, or materially affect by way of an

explanation, any written contract, whether within the statute of frauds or not, provided the contract is perfect in itself, and is capable of a clear and intelligible exposition from the terms of which it is composed.

The true rule is that the capacity in which the party acted in signing his name to the instrument must appear alone upon the face of the instrument itself.

In *Pintz vs. Staunton*, 10 Wend., 271, it was held that a person may draw, accept or indorse a bill by his agent, and it will be as obligatory upon him as though it were done by his own hand ; but the agent in such case must either sign the name of the principal to the bill or it must appear on the face of the bill itself in some way or other that it was in fact, done for him, or the agent will be personally bound. A particular form of execution is not material if it was substantially done in the name of the principal.

Evans vs. Wells, 22 Wend., 325, it was held that if from the whole instrument it can be collected that the true object and intent was to bind the principal and not the agent, courts of justice will adopt that construction of it, however informally it may be expressed.

Newhall vs. Dunlap, 14 Me., 480, it was held that where an agent drew a bill in his own name without stating that he acted as agent, he is personally liable, and evidence to show that in drawing the bill he acted as agent and intended to bind his principal, is not admissible even though the person in whose favor the bill was drawn knew that the drawer was but an agent.

In the case of *Kean vs. Davis*, 21 N. J. Law, 680, one of the cases relied upon by plaintiff in the court below to sustain the position taken, is really an authority against such position. At page 690 the Chief Justice in his opinion approves of the rule " that where it is doubtful from the face of the contract whether it was intended to operate as a personal engagement of the person signing it, or to impose

an obligation upon some third person, parol evidence is admissible to show the true character of the contract." * * * "Nor do I apprehend that this doctrine is in any wise in conflict with the leading cases cited and relied on by the counsel of defendant in error. In most if not all the cases where parol evidence has been rejected it is found that the contract was clearly in the name of an agent, and not of the principal"—thus clearly recognizing the principle contended for here—where the paper is unambiguous and not uncertain as to the capacity in which the person has acted, extrinsic evidence is not admissible to explain or vary it.

Vermont Central Railroad vs. Clayes, 21 Vt., 36, was an action brought by the railroad company on a note made payable to "the commissioners of the Vermont Central R. R. Co."

It was held that in legal effect the note was made payable to the railroad company. Mr. Justice Bennett, delivering the opinion of the court, expresses approval of this rule:

"As to bills of exchange and promissory notes, the person named as payee has the right of action, and not the person who has the beneficial interest, *and that it is to be determined upon an inspection of the bill alone, who has the right of action—in other words, who is the promisee.*"

By this we understand that when a note was made payable to a person who was agent for another, the principal could not—by showing, independent of the note, the relation of the parties and his interest in the note, and that the payee in fact had no interest in it—maintain an action upon it in his own name.

It seems to us that the question has been practically passed upon and determined by this court in the case of *White vs. The National Bank*, 102 U. S., 658.

A draft was drawn by the Stewart Silver Reducing Co. for $5,000.00 on Thos. W. Phelps, payable to the order of

The Miners' National Bank of Georgetown, Col., and accepted by the drawee.

The payee of the draft indorsed it to S. V. White in the following form:

"Pay S. V. White or order for account Miners' National Bank, Georgetown, Col.

"J. BRONNELL, Pt."

The draft went to protest, and White brought suit against the bank as indorser, alleging and showing that he bought and paid value for the draft, with the understanding that he was buying it unconditionally as commercial paper, and that the indorser (the bank) intended to bind itself as indorser by the indorsement made, and was liable notwithstanding the form of the indorsement; in other words, that it was the intention of the person making the indorsement to make it unconditional and so as to bind the bank.

This court, Mr. Justice Miller delivering the opinion, said:

"The language of the indorsement is without ambiguity and needs no explanation, either by parol proof or resort to usage.

"The plain meaning of it is that the acceptor is to pay it to the indorsee for the use of the indorser.

"If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to vary it."

In *Martin vs. Cole*, 104 U. S., 30, it was sought by an indorser upon a negotiable note which he had indorsed in blank, to show that the indorsement was made only for the purpose of transferring the title to the indorsee, and that a parol agreement or understanding was had that he was not to incur the responsibility of an indorser upon the paper. This evidence was held inadmissible on the ground that it would be allowing the terms of a written contract to be varied by parol.

Metcalf vs. Williams, 104 U. S., 93, the defendant was sued on a check in the following form:

ALEXANDRIA, VA., October 7, 1875.

The First National Bank of Alexandria, Va., pay to the order of A. E. and C. E. Tilton, seven thousand dollars.

W. G. WILLIAMS,
V. Pres't.

E. P. AISTROP,
Sec'y.

It was contended by the defendant that the check was drawn officially as the vice-president of the Montpelier Female Humane Association of Orange County, Virginia, an incorporated association having its business office in the city of Alexandria. It will be observed that there is nothing upon the face of this check to indicate what corporation or asssociation the drawers were vice-president and secretary of. Mr. Justice Bradley, delivering the opinion of the court, says: "According to the showing of the bill of complaint the check sued on was the check of the Montpelier Female Humane Association, and not the individual check of the defendant. There is nothing on its face to preclude this construction. The bank was requested by two persons, who signed themselves as officers, the one as vice-president and other as secretary, to pay a certain sum. It is evident that an inquiry into the circumstances might render it certain which was intended. * * * Where a person acts merely as the agent of another, and signs papers merely in that capacity, that is, signs them as agent, and the party with whom he deals has full knowledge of his agency and of the principal for whom he acts, the express disclosure of the principal's name on the face of the paper, or in the signature, is not essential to protect the agent from personal responsibility. It is unnecessary to determine whether the form of the document in this case was sufficient to charge innocent holders of the check with notice of its character.

The fact that it bore two official signatures—that of the plaintiff as vice-president and Aistrop as secretary—is so unusual, on the hypothesis of its being an individual transaction, and points so distinctly to official origin, that it may very well be doubted whether any holder could claim to be innocently ignorant of its true character."

In the still later case of *Cragin vs. Lovell*, 109 U. S., 198, it appeared that Eliza A. Quitman alleged in an action at law instituted against George D. Cragin in the Circuit Court of the United States for the District of Louisiana, that on January 31st, 1878, she sold a plantation to Orlando P. Fisk for the price, of $22,500, of which sum $4,500 was paid in cash, and for the balance Fisk executed his notes. It was further alleged that Fisk, in making the purchase and in executing the notes given for the unpaid portion of the purchase price, was acting as the agent of the defendant Cragin, and that subsequent to the purchase Cragin instituted legal proceedings against Fisk, asserting that Fisk made the purchase of the property as his agent, and illegally transacted the business in his own name instead of Cragin's, and that he, Cragin, was liable for and ready to pay the portion of the purchase price remaining unpaid. And that in such proceedings Cragin was adjudged to be the owner of the property so purchased by Fisk as his agent. It was further alleged that because of the fact that such purchase was made and notes executed by Fisk as the agent of Cragin, the latter was liable to her for the balance upon the notes remaining unpaid, and plaintiff in the trial court, upon proof of these facts, had judgment for the balance remaining unpaid upon the notes given for the purchase price of the plantation. This case presented clearly the question of whether it was competent to establish by extrinsic evidence that notes, which on their face did not appear to have been executed in any other than the

individual capacity of the maker, could be shown by the written declaration of the party sought to be charged that in executing the notes the maker, in fact, did not act in his individual capacity, but as the agent of said purchaser. Mr. Justice Grey, delivering the opinion of the court, says: "That it is clear that the judment at law is erroneous. The petition shows no privity between the plaintiff and Cragin. * * * * * * The notes given for the purchase money of the land bore no name but that of Fisk as maker, and on such notes no action will lie against any other person."

To the same effect see

Briggs vs. Partridge, 64 N. Y., 363.
Snelling vs. Howard, 51 N. Y., 377.
Stackpole vs. Arnold, 11 Mass., 27.
Eastern R. R. Co. vs. Benedict, 5 Gray, 566.
Williams vs. Robbins, 16 Gray, 77.
Daniels vs. Burnham, 2 La., 243.
Beckham vs. Drake, 9 Mes. and W., 79.

We submit that upon the authority of the decisions of this court, cited above, as well as upon principle that in the absence of uncertainty or ambiguity upon the face of the paper that a contract cannot be varied by extrinsic evidence, nor can the capacity of the party, executing or indorsing the paper, be shown to be other than what it appears by the paper.

But if it were conceded or were it held that there was ambiguity or uncertainty upon the face of the paper sued upon as to the capacity in which the defendant Moebs executed the indorsement thereon, to what extent does this uncertainty exist and to what extent will extrinsic evidence be admitted to show the actual capacity in which he executed the indorsement? Will evidence *aliunde* be admitted further than to ascertain whether Moebs was the secretary and treasurer of a body corporate, by whose authority and

in whose interest he executed the paper and indorsement? In other words, if it appeared from the face of the paper that he was secretary and treasurer of the Peninsular Cigar Company, that the notes were given in payment of merchandise purchased for the Peninsular Cigar Company, certainly could it be claimed that there existed any ambiguity or uncertainty as to the capacity in which he acted when the paper or indorsement was executed. And would evidence be admitted to show that although he was secretary and treasurer, as his signature would indicate, and that it was in reference to the business of the corporation of which he was secretary and treasurer that the paper and indorsement were executed, that he by mistake indorsed it officially instead of personally, as he had agreed to do or intended to do. We submit that within the reason of the authorities cited such evidence could not be admitted.

See Collender vs. Dinsmore, 55 N. Y., 206.
Bernard vs. Kellogg, 10 Wallace, 390.
Robinson vs United States, 13 Wallace, 364.

If reliance be made by plaintiffs upon the allegations contained in the special count in their declaration, or upon the evidence contained in the deposition which was excluded, we reply that it appeared from the allegations in such special count, as well as from the testimony appearing by the deposition referred to:

1st. That the defendant Moebs was the secretary and treasurer of the Peninsular Cigar Company, a body corporate.

2d. That such corporation purchased of the plaintiffs merchandise in payment for which the notes in controversy were executed.

By these allegations in the declaration and deposition, all uncertainty and ambiguity, if any existed as to the capacity in which the defendant executed and indorsed the notes, is entirely removed. Any testimony

which had for its object anything other than to show such facts, or to show that he either was not secretary or treasurer of any body corporate, or that he did not execute the paper and indorsement in the business, or for the benefit of the corporation—in other words, by the authority of the corporation—we submit would be inadmissible. We therefore insist and submit that upon any view of the plaintiffs' case which may be taken, the testimony offered for which it was claimed that it tended to show that in executing the indorsement of the notes sued on, defendant intended to have made his personal indorsement instead of his official indorsement, was not admissible, and therefore the second question considered must be answered in the negative.

THIRD QUESTION.

If such evidence was competent, was it admissible under the pleadings and issue as framed, and upon which the trial proceeded?

At the time of the trial had in the court below, the special count in the plaintiffs' declaration had been disposed of—the demurrer thereto having been sustained. Was it competent to introduce the testimony offered upon trial under the common counts in plaintiffs' declaration? The general proposition always recognized, as far as our knowledge extends, that the declaration must be as broad as the proof offered would seem to answer this question in the negative. For if it were necessary to introduce testimony to show that in executing the papers sued upon it was the intention of the defendant to bind himself personally and individually, such facts ought to have been alleged in the declaration.

The case of *The New York Iron Mine vs. The First National Bank of Negaunee*, 39 Mich., 655, was a suit brought by the bank upon notes puporting to have been executed by the New York Iron Mine by W. L. Wetmore, who was a stockholder, and acted as agent for the company

in the transaction of its business at Ishpeming, Mich. Wetmore and Samuel J. Tilden of New York were the corporators. Mr. Tilden had the principal interest from the first, and always acted as president and treasurer, keeping his office in New York City. Mr. Wetmore always, until the controversy over his authority to execute the notes sued on arose, acted as general agent for the corporation, with his office at Ishpeming, Mich.

Upon the evidence introduced it was held by the court that Wetmore did not have authority to execute the notes on behalf of the corporation. It was then contended that the course of business had been such, that as to the bank Tilden and Wetmore were to be treated as partners. The declaration was upon the common counts with a copy of the notes attached.

Mr. Justice Cooley, delivering the opinion of the court, p. 665, says: "The second position taken by the plaintiff is that Mr. Tilden and Mr. Wetmore have conducted the corporate business as if they were partners, Mr. Wetmore exercising unlimited authority at one place and Mr. Tilden at the other, and the public had a right to suppose that they were trusting each other to the full extent that partners do and must, and therefore that Mr. Wetmore might bind himself and Mr. Tilden, or, what is the same thing, might bind the corporation by notes in its name. * * * * We do not perceive that the fact that Tilden and Wetmore conducted their business as if they were partners concerns this plaintiff in any manner. * * * * The plaintiff has dealt with no partnership. The notes sued upon were given as corporate notes, taken as corporate notes, and are sued upon as corporate notes. The plaintiff must therefore make out a corporate liability, and, as Wetmore gave the notes assuming to be empowered thereby to pledge the corporate credit, it is of no importance whatever that perhaps he might have pledged his associate as a partner, had he attempted to do

so, and had the plaintiff taken from him paper that purported to be the paper of partners. For the purposes of this case, it is sufficient to say that it is not the case the pleadings make."

Under U. S. Circuit Court rule 28, when a written instrument including indorsements upon bills and notes shall be declared upon, the execution of such written instrument so declared on shall be held to be admitted unless denied by defendant under oath.

If the position taken by the plaintiff below is correct, then the failure of the defendant to deny the execution of the papers sued upon render it unnecessary for him to make other proof of the execution of the indorsement sued on, or to show that it was his indorsement; but this question has been expressly passed on in the case of *Hitchcock vs. Buchanan*, cited above. The court disposes of the question in this language: "The allegation in the declaration that the defendants made 'their' bill of exchange is inconsistent with the terms of the writings sued on, and made a part of the record."

To set out a copy of the notes sued on under the common counts, without any allegation that they were executed by the defendant in a different capacity from what they purported to be was equivalent to an allegation in a special count that he executed them as secretary and treasurer of the Peninsular Cigar Company. We therefore submit that it was not admissible to introduce evidence inconsistent with the allegations made in the declaration.

Fourth Question.

If such evidence was not admissible under the pleadings and issue framed upon which the trial proceeded, will this court review the opinion and judgment of the court below in sustaining the demurrer to the special count in plaintiffs' declaration—error not being assigned upon such opinion or judgment.

Section 997, U. S. Revised Statutes, requires that there should be annexed to the writ of error, and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an *assignment of errors*, and prayer for reversal.

Rule 21, U. S. Supreme Court Rules provides: "Where there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard except at the request of the court, and errors not specified according to this rule will be disregarded." We submit that under this statute and rule no question should be considered by the court upon which error was not assigned at the time of making the return to the writ of error, and, therefore, that the only questions for consideration are those relating to the proceedings had upon the trial, to wit, as to the propriety of the ruling of the court excluding the admission in evidence of the notes when offered, and excluding the deposition when offered.

But for reasons already given and upon the authorities cited above, we submit that if that question shall be considered, no other conclusion could be reached than that reached by the court below, and that there was no error in the opinion or judgment in sustaining the demurrer to the special count to plaintiff's declaration, nor in the proceedings had upon the trial, and that the judgment below should therefore be affirmed.

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